REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY,

IN THE TIME OF

LORD CHANCELLOR ELDON.

VOL. II.

1813—1814. 53—54 Geo. 3.

SECOND EDITION, CORRECTED,
WITH ADDITIONAL NOTES, REFERRING TO THE LATE CASES, &c.

BY

FRANCIS VESEY, AND JOHN BEAMES,
ESQRS.
OF LINCOLN'S INN, BARRISTERS AT LAW.

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CASES

IN

CHANCERY, &c.

1813, 53 *Geo.* 3.

The WARDEN and MINOR CANONS of ST. PAUL's *v.* KETTLE.

KETTLE *v.* The WARDEN and MINOR CANONS of ST. PAUL's.

1813, *May* 11, 15.

Decree for Tithes in *London* at 2*s.* 9*d.* in the Pound, under the Statute 37 *Hen.* 8. c. 12: the Occupiers not proving any certain customary Payment in lieu of Tithes; which Payment will exempt an individual House, if usually made a sufficient Time to acquire the Character of customary; though within Time of Memory, and not general through the Place or Parish.

Mere Non-payment of the Tithes under the Statute is not an Answer; as it would not be to the Claim of Tithe at Common Law.

An Issue refused under the Circumstances: 1st, Mis-pleading; the Defendants not stating customary Payments by their Answer; but adopting *ore tenus* Payments, disclosed by the Answer to their cross Bill, instead of moving for Leave to file a supplemental Answer: 2dly, the Improbability of establishing those Payments after two unsuccessful Trials at Bar in another Cause.

THE Bill in the first of these Causes, filed by the Warden and Minor Canons of *St. Paul's* and their Lessees, stated their Title as Parson and Proprietors of the Church of *St. Gregory*, under Letters Patent, 24 *Hen.* 6th, to all Tithes, &c. within that Parish; and the Decree made on the 23d of *February*, 1545, in pursuance of

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of the Act of Parliament for Tithes in *London* (*a*); by which it was directed, that the Inhabitants of *London* should pay Tithes at the Rate of 2*s*. 9*d*. in the Pound.

The Bill also stated the Act of Parliament (*b*) for rebuilding the City of *London*, uniting the Parishes of *St. Mary Magdalen, Old Fish Street*, and *St. Gregory*, and the Act (*c*), fixing among others the Tithes of those Two Parishes at £120; both those Acts saving expressly the Right of the Plaintiffs, Parson and Proprietors of the Church of *St. Gregory*, to receive all Tithes, &c. within that Parish, as before; and the Bill prayed an Account of Tithes due from the Defendants, Occupiers of Houses within the Parish.

The Defendants by their Answer, stating their Belief, that at the Time of the Decree of 1545 less Sums than 2*s*. 9*d*. in the Pound had been accustomed to be paid for Tithes in respect of the Houses, occupied by the Defendants, or the Scites thereof, insisted, that they ought to pay only such Sums as had been so accustomed to be paid at the Time of the Decree; and "as Evidence of such "accustomed Payments," they alledged, that no Tithes or yearly Payments in the Nature of Tithes have ever since the said Decree been paid at or after the Rate of 2*s*. 9*d*. in the Pound Rent; and, as farther Evidence, that it does appear from Documents in the Possession of the Plaintiffs, that from the Year 1595 to the Year 1763 (with such Interruption only in 1661 as after mentioned,) Leases of the

(*a*) Stat. 37 *Hen*. 8. c. 12.

(*b*) Stat. 22 *Ch*. 2. c. 11.

(*c*) 22 and 23 *Ch*. 2. c. 15. This Statute is more confined than the 37 *Hen*. 8. c. 12. The Statute of *Henry* extends both to lay Impropriators and spiritual Persons, while the Stat. of *Charles* applies to preaching Ministers only. *Ward* v. *Hilder*, *Gwill*. 538.

Tithes

Tithes of the said Parish were from Time to Time let to certain Inhabitants in Trust for the Parish at large, at annual Rents; which varied but little before 1630; and have since that Period been invariable; and upon Fines, calculated, except in three Instances, after the Rate of £50 upon every Renewal, where fourteen Years of the former Lease were unexpired; whereas, if the said Tithes had been payable at the Rate of 2*s.* 9*d.* in the Pound, the Fines and Rents upon such Renewals would continually have increased; and would even in 1661 have amounted to nearly ten Times the Value so paid by the Parish to the Warden and Minor Canons as Fine and Rent; and, as farther Evidence, that it did appear from the Records of the Court of *Exchequer*, that in 1661 the Warden and Minor Canons granted a Lease of the Tithes of the said Parish to *Thomas Morris* and *Ann* his Wife for twenty-one Years; that *Morris* and his Wife in 1661 filed their Bill in the Court of *Exchequer* against *Turner* and other Inhabitants of *St. Gregory*, claiming Payment of Tithes after the Rate of 2*s.* 9*d.* in the Pound, or according to the ancient accustomed Payments, if such there were; and that the Defendants in that Suit by their Answers insisted, as these Defendants now insist, that there existed at the Time of the Decree in *Hen.* 8, a certain accustomed Payment for the Premises respectively occupied by them less than after the Rate of 2*s.* 9*d.* in the Pound.

The Answer farther stated, that upon the Hearing of that Cause Issues were directed, to try the Fact of such accustomed Payments; upon the Trial of which Issues it was ordered, with Consent, that a Juror should be withdrawn and the Difference referred to the then *Attorney-General*; that no Traces are to be found of the Award, made by the *Attorney-General*: but it does appear by Documents in the Possession of the Plaintiffs, that the Claim to Tithes after the Rate of 2*s.* 9*d.* in the Pound was

 abandoned;

abandoned; that the Lease, granted to *Morris* and Wife, was surrendered; and in the Year 1666 a Lease for eighteen Years was granted by the Warden and Minor Canons to certain Inhabitants in Trust for the Parish at the same Rent, which had been before, and ever after continued to be, the Rent paid by the Parish for the Tithes.

As farther Evidence of the said accustomed Payments the Defendants alledged, that during the Usurpation of *Cromwell* no Tithes were paid in *London;* and it does appear from an Entry in an ancient Book belonging to the said Parish of *St. Gregory* that at a Vestry, held for such Parish in 1661 for the Purpose of renewing the Collection of Tithes, certain Persons were appointed by the said Parish to examine the new Tithe Book with the old Book; thereby demonstrating, that the said Tithes were then paid, not after any equal Rate of Payment, according to the Rent, but after some ancient Book or Roll; and, as farther Evidence, that the last of the Leases, usually executed by the Warden and Minor Canons, was suffered by the Parishioners to expire in 1760; refusing to renew; considering it disadvantageous to them by reason of the Losses sustained in collecting.

The Answer then insisted, that the Intent of the Act of the 22d and 23d *Chas.* 2. was to substitute in the Parishes, which had suffered by the Fire, certain annual Sums for the Maintenance of the Ministers in lieu of Tithes, payable under the Decree of 1545, by reason that the said Tithes had become uncertain in Collection from the Fire having taken away many Houses, and altered the Foundations of others; that an annual Payment of £120 was thereby directed to be made in lieu of Tithes to the Minister of the Parish of *St. Gregory* and *St. Mary Magdalen*, which were united by the said Act, and to be paid proportionably by the said united Parishes; and that the

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the last Clause in the said Act, providing, that the Warden and Minor Canons notwithstanding that Act should continue to enjoy all Tithes, as they formerly had or lawfully might have done, was totally inconsistent with the general Spirit and Intent of that Act; subjecting the Parish of *St. Gregory* to an unequal and double Payment by charging upon the said Parish in common with the others, mentioned in the Act, a new and certain annual Maintenance to the Minister in lieu of Tithes, continuing in that particular Parish the Tithes also.

The Answer farther stated, that from Transcripts in the Registry of the Diocese of *London* the first Assessment under the Act of 22d and 23d *Chas.* 2. was made in 1672 and the second in 1681; which second Assessment had ever since continued the Assessment, by which the Minister's Maintenance is apportioned and collected in the said united Parishes. The amount, charged upon *St. Gregory* by the Assessments for its Proportion of the Minister's Maintenance, was £90: 16*s*: 8*d*. which Sum was by the Assessments divided among the then Occupiers in the Nature of an equal Pound Rate upon the Rent or Value of the Property respectively occupied by them; and the Sums, assessed in respect of different Property in the Assessment of 1681, have with very few Exceptions ever since been continued thereon. The accustomed Payments (if any) due to the Warden and Minor Canons in the Nature of Tithes, amounted to something about the same Sum as the Proportion of the Minister's Maintenance; and the Necessity of making an equal Pound Rate for the Minister's Maintenance introduced into the Parish the Notion of an equal Pound Rate for the Minor Canons' Tithes: each Defendant alledging, that up to 1792 (from which Period the Bill claimed the Tithes) he paid "in respect of the "Premises occupied by him in the said Parish the annual "Sum of," &c. "for the Minister's Maintenance, and also

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" the like annual Sum of" &c. " for the Minor Canons' " Tithes."

The Answer farther alledged, that the Plaintiffs were possessed of a certain Book, entitled " a Register of the " Lands and Tenements belonging to the Minor Canons:" in which is the following Entry—" The annual Rate or " Sum of Money yearly £120 in lieu of Tithes for the " Incumbent of the united Parishes of *St. Mary Magda-* " *len, Old Fish-street* and *St. Gregory*, assessed by us, " whose Names are subscribed, by virtue of a Decree of " the *Lord Chancellor*, bearing Date the 25th Day of " *February*, 1672; which said Rate is levied upon the " Parish of *St. Gregory* by an equal and proportionable " Rate with the aforesaid Parish, over and above the full " Tithes due and payable to the Warden and Minor Canons " of *St. Paul's*, according to the said Decree."

This Entry is followed by the Names of Persons, who appear to have been the Inhabitants of the said Parish of *St. Gregory* about the Year 1762; and opposite to each Name are set two Columns of Sums · the first Column being sometimes entitled " last Rate," and sometimes " new Rate;" and the other Column being sometimes entitled " first Rate," and sometimes " ancient Rate;" and at the Foot, and within the Lines, which form the first Column, is the following Memorandum: " Note, that all " within this Apartment is as it was last rated for the Petty " Canons' Tithes, from *March* the 25th, 1676, to *March*, " 1677." The " first Rate" is a Copy of the Assessment of 1672, but the " last Rate" is not a Copy of the Assessment of 1681.

The Answer farther alledged, that upon a Comparison of the Transcript Roll of 1672 with the Transcript Roll of the Rate of 1681, it would appear, that a very great Proportion of the Sums is precisely the same in both Rates; and

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and they differ only in such Manner as might be expected from the Change of Condition and Improvement, which in nine Years would happen in the Property assessed: but, upon comparing the Columns or Names in the said Register Book, entitled "last and new Rate," with the Assessments of 1672 and 1681, it will appear, not only that the Sums therein are not the same as those in either of the said two Assessments, but that they bear no Relation or Proportion thereto; being sometimes treble, sometimes double, and sometimes less than, the Sums in the Rates of 1672 and 1681; from whence it appears, that the "last and new "Rate" was not one of the Rates made for the Minister's Assessment, as supposed by the Writer of it; and that it was not an equal Pound Rate; by reason that it bears no Relation or Proportion to the two other Rates, which were clearly Pound Rates; but that, from the Memorandum at the Foot, it manifestly was the Rate, by which the Minor Canons' Tithes were last collected, from *March*, 1676, to *March*, 1677; and that, not being a Pound Rate proportioned to the then Value of the Premises occupied, it must have been an "ancient Rate."

The Answer then insisting, that such Rate does contain the ancient accustomed Payment within the Parish for or in the Nature of Tithes, and that the Defendants ought to pay for Tithes (if any Thing) only such ancient Sums as in the said Rate are charged upon the Premises now respectively occupied by them, or upon the Scites thereof, or the Buildings then thereon erected and built, concluded by stating, that the Defendants have no Means of ascertaining, what particular Sums are charged in the said Rate on the Premises now occupied by the Defendants; but the Plaintiffs, in an Answer to a cross Bill, filed against them by *Robert Morris* (*a*), did state, that they had used great Diligence in tracing out, and had thereby learnt and could dis-

(*a*) 9 *Ves.* 155—316.

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tinguish, except in a very few Instances, as they believed, the particular Premises, mentioned or referred to in the said two Assessments in the said Register Book, which were then occupied by *Morris* and others, Plaintiffs in such cross Suit, as well as by the other Inhabitants of the Parish respectively.

The Defendants, by their cross Bill, stating the several Matters alledged in their Answer to the original Cause, prayed a Discovery.

The Warden and Minor Canons in their Answer to the cross Bill stated, that in the 4th and 5th of *Philip* and *Mary*, a Lease of the Tithes, or Payments in lieu of Tithes of *St. Gregory*, was granted to *William Beswicke* for 21 Years, at the yearly Rent of £25 : that in *December*, 1595, a Lease was granted in consideration of some Fine, (the Amount of which is not stated in the Lease), in Trust for the Parishioners, for 21 Years, at the annual Rent of £37 for the first three Years, and £38 : 8*s.* for the Remainder of the Term; which Lease was renewed, and Leases of the Tithes from Time to Time, except during the Rebellion, until the Lease, which expired in 1763, as after stated, were granted, and renewed by the Minor Canons for the Time being, to certain of the Inhabitants of the said Parish, in Trust for the others, on Payment of Fines; but which Leases were not granted at invariable yearly Rents; and the Fines, paid on the Renewal of such Leases, varied only in Proportion as more or less of the said Terms of 21 Years happened to be expired; stating, as Instances, a Fine of £200 paid on a Lease, in 1630, for 21 Years, on Surrender of a former Lease, of which eleven Years were unexpired; on another Lease, granted in 1700, for the like Term on the Surrender of a former Lease, of which 16 Years were unexpired, a Fine of £100; and on a Lease granted in 1707, of which seven Years were unexpired,

pired, a Fine of £50. The Answer admitted, that the Sums assessed in respect of the different Premises in the Assessment of 1681, may have been, with very few Exceptions, ever since continued upon the same Premises, or upon the Scites thereof, or the Buildings from Time to Time thereon erected; denying that the accustomed Payments amounted to something about the Minister's Maintenance; stating, that when a Survey was made of all the Ecclesiastical Benefices, under the Statute 25 *Hen.* 8. c. 3. the Tithes of *St. Gregory* were estimated at £19 : 7*s* : 6*d*.; that in 1638 they were estimated at £140, and in 1676 at £100; and denying, that the last and new Rate was an ancient Rate; or contained the ancient accustomed Payments within the Parish for or in the Nature of Tithes.

Mr. *Leach*, and Mr. *Roupell*, for the Defendants in the first Cause.

The proper *Forum* for the Decision of this Question is a Jury; and that was your Lordship's Opinion in *The Warden and Minor Canons of St. Paul's* v. *Morris* (*a*). The Defendants, having no other Means of proving the Exceptions, on which they rely, than by reference to the Rate in the Possession of the Plaintiffs, for that Purpose filed the cross Bill; the Answer to which has disclosed, what are the particular Payments substituted for those established by the Statute and Decree. The different Leases, granted by the Warden and Minor Canons for the Time being, are utterly inconsistent with their present Claim, as being irreconcilable with an increasing Value; standing on the Basis of a permanent Value, never fluctuating even by the most opposite Events; neither rising with the increasing Value of Property, nor falling with the diminished Value of Currency. From 1630 to 1742 the same Rent is invariably

(*a*) 9 *Ves.* 155.

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reserved; and from 1595 to 1630, the Difference is merely two or three Pounds; probably resulting from the Ease or Difficulty of collecting the customary Payments. The Fines will not afford any Conclusion more favourable to the Plaintiffs; being from 1707 to 1742 precisely the same on every Lease; and the Quantity of each Term unexpired at the Periods of Renewal, is not in a Proportion that can form the Foundation of any Argument. The greatest Fines are those of the most distant Dates; a Fact as little to be reconciled with the Notion of an increasing Value of the Tithes in Proportion to the depreciated Currency, as the Uniformity of the Rents. Upon that Hypothesis in 1630 the Fine ought to have been £600 instead of £200. This Variation may be thus accounted for. The Lessees, finding Difficulties in the Collection, which they had not foreseen, and sustaining Losses they had not calculated upon, would naturally on each successive Renewal stipulate for a reduced Fine.

The next Ground of Defence is the Suit in the Court of *Exchequer*, in 1661. It is true, the Award of the *Attorney General* is not forthcoming; but the Fact that a new Lease was granted three Years afterwards at the old Rent is equivalent. The Question returns to this: whether the Defendants have shewn the Existence of Payments, substituted for those prescribed by the Statute and Decree; your Lordship having expressed a decided Opinion, that the statutory Payments never have in Fact existed; and the whole of these Transactions incontrovertibly prove, that 2*s*. 9*d*. in the Pound never prevailed as a Payment in this Parish; but that there always has been an ancient customary Payment in lieu of it.

Mr. *Richards*, Sir *Samuel Romilly*, and Mr. *Wetherell*, for the Plaintiffs in the original Cause.

This is merely a Re-hearing of the Cause of *The Warden*

den and Minor Canons of St. Paul's v. *Morris*. The Plaintiffs, in their Character of Rector, must recover the Payments according to the Statute, unless the Defendants can prove customary Payments in lieu of them. The Attempt to plead these alledged customary Payments, as a parochial *Modus*, which clearly they are not, fails altogether in Proof. If the Court would let the Defendants into Proof of a parochial *Modus*, the Leases furnish Evidence in Opposition to its Existence. The Argument, drawn from the Uniformity of the Leases, is erroneous. They vary in Rents and Fines; a Fact inconsistent with a settled customary Payment: nor have the Defendants shewn, that the Lessees invariably received the same customary Payments from the Parishioners. The Rates are not more favourable to the Defence; rather furnishing Evidence against the Existence of a *Modus*. In all Cases, where a *Modus* is set up, it should be stated with Clearness and Precision; though this is less material in an Answer, than a Bill (*a*). Not one of the Defendants mentions the Sum, which he considers as the *Modus*; all alledging, that they are unable to state any *Modus*: yet on an Allegation so vague an Issue is asked, for the Purpose of establishing as *Moduses* certain specific Sums never mentioned in the Pleadings. In some Respects the Defendants assimilate them to Farm-*Moduses*: but then they ought to state, not merely the precise Sums, but the specific Property covered; each setting up his own individual *Modus*, and specifying his Property covered by it. There is no Instance, where the Court has dispensed with a Defendant's setting out the specific Sum, which he alledges as a *Modus*. Had these Defendants, however, proved all they alledge, it is difficult to conceive, how the Warden and Minor Canons could be bound by Rates, made, not by them,

(*a*) See *Scott* v. *Smith*, ante, Vol. I. 145, and the References in the Notes. *Wood* v. *Wray*, *Gwill.* 1457. *Anstr.* 838.

but

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but by the Lessees, contracting for themselves. The Inference, drawn from the Decrease of the Fines in latter Periods, proceeds on the Supposition, that this is a parochial *Modus*. Their Fluctuation proves no more, than that the Warden and Minor Canons, like most other Ecclesiastical Bodies, have been very negligent of their Interest. Your Lordship has (*a*) said, that the customary Payment, alluded to by the Act of *Hen.* 8. was not necessarily to be carried back to the Time of *Richard* the First: but it is not proved to have existed at any Time before the Act. If, as is alledged, the 2*s*. 9*d*. in the Pound was for a Time after the Fire of *London* not collected, the Reason probably was, that the Misery and Poverty, which followed that Calamity, induced the Warden and Minor Canons to forego for a Time the full Exaction of their Rights.

Mr. *Leach*, in Reply.

All, that has been decided by your Lordship and the House of Lords, is, that a new Trial should not be granted. The Statute of 37 *Hen*. 8. says (*b*), that there were certain Places or Districts paying less than 2*s*. 9*d*. in the Pound; not pointing to Individuals. These Occupiers say, the Parish of *St. Gregory* was one of those Places.

Is not this a Case, in which, to use your Lordship's Words, the Court would exercise its Right of deciding without an Issue "very tenderly and sparingly?" The Warden and Minor Canons appear to have renewed, at a Rent of £40 : 6*s* : 8*d*. when, had they been entitled to the 2*s*. 9*d*. in the Pound, they might have demanded at least £800. They cannot be represented as having acquiesced in their Loss, or as inattentive to their Interests. These

(*a*) See 9 *Ves*. 165, and 633.
Bennett v. *Trepass*, 2 *Gwill.* (*b*) c. 12. s. 18.

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Suits too strongly prove the Reverse. The Property covered is described in a Manner perfectly intelligible to the Plaintiffs; who know the Scite of each House; and can state, what stood on each Foundation fifty Years ago. If the precise Amount of the customary Payments is not stated, the Plaintiffs are referred to the Rate, which they admit to be in their Possession; and that they are acquainted with its Contents; a Mode of Pleading unquestionably sufficient to put them in Possession of the Amount.

The Lord CHANCELLOR.

Under the two Statutes of *Henry* 8. and *Charles* 2. (*a*) it is clear, that the Plaintiffs in the original Cause are entitled to 2*s*. 9*d*. in the Pound, unless the Inhabitants can protect themselves under the 18th Clause of the Statute of *Henry* 8, directing that, where less hath been accustomed to be paid for Tithes, the Payment shall be "after such "Rate as hath been accustomed." The Opinion of Lord Chief Justice *Eyre* was, that this Statute was never intended to give to individual Houses the Benefit of customary Payments, except as applying not only to individual Houses, but generally to some Place; that it was rather a parochial Payment than a Payment attached to individual Houses. That Opinion appears to me to be well founded: but it is impossible at this Day to act upon it: many Cases having established, that an individual House may be protected, provided the Owner or Occupier can prove a customary Payment in this Sense, that previously to this Act of 1545 that Payment had been so long made as to have acquired the Character of customary Payment with regard to Tithe; and the Construction is not, that it must be a Payment Time out of Mind, but, if that Payment has been usually made during such Time as to have acquired in the Ecclesiastical Courts the Character of a customary Payment, the Statute operates upon it.

(*a*) Stat. 37 *Hen*. 8. c. 12. 22 *Ch*. 2. c. 11.

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That was decided in *Williamson* v. *Gosling* (*a*), a very leading Case; which proves that to be the Law at this Day. *Gosling* was the Owner of four Tenements; three subject to customary Payments, the fourth not. He pulled them all down; and upon the Scite erected two new Tenements; and it was contended, that from the Change in the Nature of the Premises the customary Payments could not attach: but the Court of *Exchequer* held, that the Payment was to be compounded of the Value of the three customary Payments, and the Tithe, at 2*s.* 9*d.* in the Pound for so much of the Premises as was erected upon the Scite of the fourth Tenement, to which no customary Payment had been applied.

There is no Doubt therefore, that, if these Individuals can prove, that before this Statute a Sum of Money was raised upon each House, and so long before as to have acquired the Character of a customary Payment, to so many Houses as it can be applied to it is in Law applicable; though there is no such general Custom through the Place or Parish. I repeat what has been said in many late Cases; that, whatever may be the Probability that 2*s.* 9*d.* in the Pound never was paid in this Parish (and I do not retract the Belief I expressed in the Case of these Plaintiffs against *Morris* (*b*), that it never was paid), yet I cannot regard that Fact as more than negative Evidence, strong negative Evidence, if connected with material positive Evidence, that there must have been some other Payment due from the Parishioners: but, I apprehend, it is equally clear upon Grounds lately discussed, and clearly established, in the House of Lords, that in this Case of a Claim of this Payment, as in the Instance of a Claim of Tithes more strictly, it is not sufficient for the Defendant to say against the Claim under the Statute, as it would not be sufficient

(*a*) 3 *Gwill.* 902.

(*b*) *The Warden and Minor Canons of St. Paul's* v. *Morris*, 9 *Ves.* 155.

against

against the Claim at common Law, that the Plaintiffs never had received the 2*s*. 9*d*.: but it is incumbent upon the Defendant to shew himself to be entitled to the Benefit of that Decision by saying, that he is the Occupier of Premises, describing them, to which those customary Payments, which he can specify, can be proved to have attached previously to this Statute of 1545.

So the Law obliges me to dispose of all the Argument from the Circumstance, that the Parish were through Centuries Lessees of the Tithes from the Minor Canons; as in the Case of *St. Bride's* Parish; where the same Thing occurred; that the Tithes were let at such comparative Value, that it was impossible to believe, that 2*s*. 9*d*. was conceived, either by the Minor Canons, or their Lessees, or the Parishioners, to be the Sum; the Fines with the Rent bearing no Proportion to the Magnitude of that Payment. The Answer to that is, that they must have the 2*s*. 9*d*. unless some other Rule of Tithing can be established, founded on the Fact of a customary Payment of a certain, less, specified Sum, due, when this Statute passed. It is therefore to no Purpose to lament, however lamentable, that this has gone on from Century to Century in so amicable a Way, that the Parties seem to have forgotten what was due to themselves; not preserving Evidence of the Payments they insist upon as customary.

Supposing this to be the Law, the Question remains as to the Pleadings. Upon the Answer to the original Bill it is impossible to say, they have so pleaded their Exemption as to entitle them to an Issue. That is established by the late Case in the Court of *Exchequer;* but it is said, if the Minor Canons knew, what were the customary Payments, and the Occupiers do not know that, they did not in their original Answer state those Payments from Incapacity to do so; and it is against Conscience to let the Plaintiffs

take

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take Advantage of that Omission, when by making a Discovery they can remove the Obligation. Therefore it is said, the cross Bill was filed; and the Minor Canons have made a Discovery of this Book, and the Premises; that the Answer to that cross Bill must be taken with the original Answer; and therefore the Exemption is well pleaded.

I think, it is impossible to maintain that Proposition. The Defendants, having obtained this Discovery, ought to have moved for Leave to file a supplemental Answer: and the Court will not take an argumentative Answer, that it may be so: but, when to a Bill for Tithes a *Modus*, or customary Payments of this Kind, are pleaded, the Plaintiff has a Right to call upon the Defendant to set out upon his Oath his Belief, that it is so. I will however take it, as if they had in the original Answer pleaded technically and properly, that this Column in the Book produced, provided the Premises can be identified, points out the customary Payment for each House; and examine, whether it is possible, that this can be so probably made out as Fact, that Issues ought to be directed.

First, though this is not a parochial Exemption, yet from the Nature of it each Parishioner must insist, that every House, or nearly every House, is covered by some Payment peculiar to it, not the same in Amount, but the same in this Respect, that it is a customary Payment; and there is no Evidence, by which they can make out their Houses to be so covered, that would not prove a customary Payment equally for every House, identified with those of the Rate of 1676. This has been tried twice; and the Materiality of this old Rate of 1676, as distinguished from those of 1672 and 1681, was fully considered. It was the very Circumstance, which in Aid of others, that were not equal to the Effect contended, was mainly relied on in the Trial.

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My Opinion, that I was right in refusing a new Trial here, and joining in refusing it in the House of Lords, is confirmed by a more accurate Examination of this Rate. It is supposed to have been made in 1676. The Suit in the Court of *Exchequer* was relied on; which accounts for all these Animosities and Quarrels by a Suggestion upon the Record, that the Rectors found it excessively difficult to collect such small Sums from an infinite Variety of Persons, continually changing; and were therefore very glad, when they could keep the Matter quiet by getting the Parish to become the Lessees. The Bill in that Suit was filed against several Defendants, eight or nine; who in 1661 pleaded with great Accuracy customary Payments; most technically stating the Houses, and the Sums applicable to them. If those Sums, stated in that Year by a very considerable Body of Defendants as customary Payments, were really customary Payments, and the Rate of 1676 is to be taken as establishing the customary Payments in the Parish, it is difficult to conceive, that the Payments, alledged in 1661, would not be the Payments in 1676 also. Examining the Answer, put in in that Cause in 1661, with this Rate, you would expect to find the Rate containing the same Sum, paid for the Premises, (to take one Instance) of Sir ——— *Turner*, as he had in his Answer in the Court of *Exchequer* stated, as the Payment, upon his Oath. It is the more remarkable, as this Rate is signed by him. In his Answer he states the customary Payment as 13*s*. 3*d*.: but here is his Name to the Rate, containing a perfectly different Sum; and I have traced the Variation through many others. The Names of the Defendants I cannot find: they probably had changed their Habitations. But as to the Payments the other Defendants set up, if they were the ancient Payments, though there had been a Change of Inhabitants, yet the ancient Payment for a House in 1661 must be the Payment attaching upon the same House in 1676. I find in this

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Rate of 1676 but one Instance of a Payment corresponding with the Answer.

There is another Way of putting this Case. It is impossible to ascertain, when this Note was written at the Bottom of this Column; as it is without Date: but it is remarkable, that the Sums thus rated upon that Parish, amount within a Trifle to the Payment of £120 for the Maintenance of the Minister.

After two Trials at Bar, when it is admitted, that through Centuries there has been no customary Payment, and no Man has been able to say, what it was, where there is no Evidence before me, that there has been a customary Payment, when clearly there has been none, and Payment by Assessment is proved, repeating, that this Court, though it has the Power of deciding upon Fact, as well as Law, ought to be very cautious in deciding upon doubtful Facts, I ask, is this a Case, that I ought to send to a Jury? As the Answer to that Question can admit of no Doubt as to some of the Defendants, not identifying their Houses, so as to others this is a Defence in common, with those who have tried the Question on Behalf of all, having that Defence in common; and having heard all, that has been observed upon this old Rate, which is the only positive Evidence, supposing it Evidence of a customary Payment, as it is not, my Conclusion is, that by permitting this to go farther I should give a mere Chance: therefore this Sum of 2*s.* 9*d.* though I believe it never was paid, must be paid, unless the Defendants can in some legitimate Way make it probable, that some other Payment has been made. Of that there is no Probability; and therefore the Decree must be for the Payment of 2*s.* 9*d.* against all the Defendants.

LORD

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May 31.
June 3.

Copyright in private Letters, remaining in the Writer after Transmission, and protected by Injunction against Publication.

Injunction against publishing private Letters, alledged to have been obtained from an Agent, to whom they were sent in Confidence, dissolved upon the Answer, denying Confidence, and avowing the Defendant's Object in publishing them in a Newspaper, of which he was Proprietor, to be, not Profit, but the Vindication of his Character from the Imputation of giving false Intelligence, publicly cast upon him by the Plaintiff.

THE Bill stated, that between *August*, 1812, and *April*, 1813, Lady *Perceval* wrote and sent to the Defendant *Mitford* several Letters of a private Nature, in the Confidence that he would not part with them, or communicate the Contents to any Persons; and that he would neither publish them nor permit them to be published; that *Mitford*, in Breach of the Confidence, so reposed in him, delivered such Letters, or some of them, to the other Defendant *Phipps*, to the Intent that he should publish them; and accordingly *Phipps* did, on the 2d of *May*, insert and publish in a public Paper, called *The News*, published by him, a Letter, purporting to be one of the said Letters, so written and sent by the Plaintiff to *Mitford*; and he in the same Manner announced an Intention of continuing to publish the other Letters. The Bill prayed an Injunction, restraining the Defendants from printing or in any Manner publishing the said Letters, or any of them, and from parting with them, or any Copies of them, otherwise than to the Plaintiffs.

The Answer of *Phipps* stated his Information by *Mitford*, that he, *Mitford*, was confidentially employed by Lady *Perceval* to publish from Time to Time authentic Information relative to a Subject, which very much engrossed the public Attention; when *Phipps* desired *Mitford* to offer his Newspaper as a Channel for communicating such Information to the Public; that afterwards *Mitford*, delivering to him a Letter, purporting to be written by Lady *Perceval* to *Phipps*, thanking him for his

 Offer,

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Offer, informed *Phipps*, that Lady *Perceval* wrote such Letter; and authorized him to inform *Phipps*, that *The News* should be the only Paper in *London*, to which Articles, relative to the Subject, would be sent by her. *Mitford* frequently afterwards brought to *Phipps* various Paragraphs and Articles for Insertion; declaring them to be of Lady *Perceval*'s Hand-writing, and sent by her for Publication; which were accordingly inserted; and on the 1st of *April*, 1813, delivered a Paper, copied, as he stated, by him for Insertion by Desire and in the Presence of Lady *Perceval*, which *Phipps* accordingly inserted on the 4th of *April*: but having since discovered such Intelligence to be false, he applied to Lady *Perceval*; who denied, that any such Intelligence had ever been sent; stating, that the Papers containing it were Forgeries. *Mitford* positively asserted the contrary; and in Corroboration of his Assertions, and to enable *Phipps* to justify himself to the Public, produced and delivered to him several Letters, written by Lady *Perceval* to *Mitford* upon similar Subjects, materially tending to shew, that the Intelligence, published on the 4th of *April*, came from Lady *Perceval*; and that she authorised *Mitford* to carry the Papers to *Phipps* for Publication; that these were the Letters alluded to in the Bill; and that *Phipps* had no others.

The Answer farther stated, that the Plaintiffs having in Addresses to the Public denied, that Lady *Perceval* was privy to the Publication of the 4th of *April*, the personal Character of *Phipps* and the Value of his Paper were in great Danger of falling into Discredit with the Public; the Defendant denying, that the Letters were of a private Nature, and were sent in Confidence that they would not be parted with; and submitting, that under the Circumstances *Phipps* had an Interest and Property in the Letters; and ought not therefore to be restrained from publishing them.

Upon

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Upon this Answer a Motion was made, that the Injunction, which had been granted by the *Lord Chancellor*, may be dissolved.

Sir *Samuel Romilly*, and Mr. *Treslove*, in support of the Motion.

This Court has never interfered to restrain the Publication of Letters, unless the Person applying had the sole Property in them: the Principle being the Invasion of literary Property. *Pope* v. *Curl* (*a*), and *Thompson* v. *Stanhope* (*b*), are the only Cases in Print upon this Subject. The latter is no more than the Opinion of Lord *Apsley;* as by the *Register*'s Book it does not appear, that an Injunction was actually granted. In that Case also the Defendant had no Interest in the Letters; and had tortiously obtained Possession of them. The Case of *Forester*, there mentioned, was that of Mr. *Forester*'s Notes, lent in Manuscript to a Person, who sold them to a Bookseller, and in Mr. *Webb*'s Case his Clerk sold his Precedents(1); both Instances of direct Invasion of Property. In this Instance a gross Imputation has been cast upon this Defendant; who, though he possibly might have Redress at Law, is entitled to use these Letters for the Purpose of clearing his Character; and the Court will not deprive him of those Means of repelling that injurious Imputation. A Claim of Copyright might as well be raised in Bills of Parcels, or Invoices. There was a Case, in which this Court, at the Suit of the *Attorney-General*, restrained the Publication of Matters in the Privy Council; but that, proceeding on Grounds of State, bears no Analogy to this Case. Since the Statute of *Ann* (*c*), securing Copyright, this Court has

(*a*) 2 *Atk.* 342.

(*b*) *Amb.* 737. See also *Earl of Granard* v. *Dunkin*, 1 *Ball* and *Beat.* 207.

(*c*) 8 *Ann.* c. 19. Concerning this Act, see *Miller* v. *Taylor*, 4 *Burr.* 2303.

(1) *Amb.* 695.

 interfered

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interfered to an Extent not authorised by that Statute. Under the Expression "Book or Books" (a), it seems difficult to comprehend Letters: but in *Pope* v. *Curl* Lord *Hardwicke* thought they were comprised within the Intention of the Act. That Case, however, stands upon the distinct Ground, that Profit was the sole Object of the Publication. Upon what Principle can literary Property remain in the Writer of a Letter, after it has been sent; which may not be his own Composition? This would lead to many extraordinary Consequences; that Letters might be taken in Execution; that the Executor of the Writer might file a Bill against the most intimate Friend of his Testator; or the Defendant in an Action for criminal Conversation, or Breach of Promise of Marriage, to have his Letters, the principal Evidence against him, delivered up. The Confidence, alledged by this Bill, is not of that Nature, which this Court can take Cognizance of, as the Foundation of a Breach of Trust. If an Action at Law cannot be maintained, this Court will not interfere. *Walcot* v. *Walker* (b).

If, as Lord *Hardwicke* has said, there is a joint Property in Letters, the Court will not restrain the Publication, where the Object is not Profit; but will do Justice to the Plaintiff by giving an Account of the Profits.

Mr. *Hart*, in support of the Injunction.

The two Cases, that have been mentioned, are clear Authorities, that the Publication of Letters may be restrained, as any other Subject of literary Property. In *Thompson* v. *Stanhope*, though Lord *Chesterfield*, declining the Offer to restore the Letters, abandoned all Right of Property in them, Lord *Apsley*'s Opinion was, in Favor of the Injunction. In *Walcot* v. *Walker*, there was from the first a Dis-

(a) In the Preamble, however, the Expression is "*Books and other Writings.*"

(b) 7 *Ves.* 1.

pute

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pute as to the literary Property. Independent however, of literary Property, there is a clear Right to restrain the Publication of private Letters, amounting to a Breach of Confidence. If a Merchant's Clerk should attempt to publish the Letters of his Employer, which might produce his Ruin, this Court would certainly prevent such a Breach of Confidence; though it would not interfere with other Jurisdictions. There was a recent Instance of an Injunction, restraining the Publication of Letters from an old Lady, under the Influence of a weak Attachment to a young Man (a). The Defendant *Phipps* does not deny, that these Letters are private confidential Communications to the other Defendant; nor affect any Right or Interest in them. His plain Object by publishing them in his own Paper is Profit in some Shape.

Sir *Samuel Romilly*, in Reply.

In the Case of the late Dr. *Paley*, who left certain Manuscripts, to be given to his own Parishioners only, a Bookseller, having obtained Possession of them, was restrained from publishing. This Case, as it originally came before the *Lord Chancellor*, resembled those of *Pope* v. *Curl*, and *Thompson* v. *Stanhope*: but, as it is now disclosed by the Answer, it bears no Resemblance whatever to them. If in the Case, referred to by the Plaintiff, the Injunction proceeded on the Ground of irreparable Mischief, it is a singular Instance.

It is admitted, that these Letters might be used as Evidence in a Court of Justice, notwithstanding the Claim of literary Property; and there is no sound Distinction, where the Defendant's Object is the same, to vindicate his Character, though in another Manner. An Injunction so general, restraining Publication in any Manner, cannot rest upon the Intention of Profit, as Proprietor of this individual Paper.

(a) —— v. *Eaton*, 13th *April*, 1813.

The

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The VICE-CHANCELLOR.

Being called upon by this Motion to dispose of an Injunction, granted by the *Lord Chancellor* against the Publication of these Letters, I wish to read the Bill and Answer: but I will state, how it strikes me at present. An Injunction, restraining the Publication of private Letters, must stand upon this Foundation; that Letters, whether of a private Nature, or upon general Subjects, may be considered as the Subject of literary Property; and it is difficult to conceive in the Abstract, that they may not be so. A very instructive and useful Work may be put into that Shape, as an inviting Mode of Publication. In the Cases, referred to upon the Letters of *Pope* and *Swift* and Lord *Chesterfield*, the Subject derived its Right to Protection from its Character of a literary Composition; a Character, which did not cease, when it was put in the Shape of Letters.

The Question then arose, whether, Letters having that Character of literary Composition, the Transmission of them to the Person, to whom they were addressed, deprived the Author of his Power over them, as his Composition, so far as to authorize a Publication without his Consent; and it has been decided, that by sending a Letter the Writer does not give the Receiver the Power of publishing it: that, whether he is to be considered as a joint Proprietor or not, Letters have the Character of literary Composition stamped upon them, so that they are within the Spirit of the Act of Parliament, protecting literary Property; and a Violation of the Right in that Instance is attended with the same Consequences, as in the Case of an unpublished Manuscript of an original Composition of any other Description. Admitting, however, that private Letters may have the Character of literary Composition, the Application of that, as a universal Rule, extending to every Letter, which any Person writes upon any Subject, appears to me to go

a great

a great Way; including, as has been justly observed, all mercantile Letters, all Letters passing between Individuals, not only upon Business, but on every Subject, that can occur in the Intercourse of private Life. If in every such Instance the Publication may upon this Doctrine be restrained, as a Violation of literary Property, whatever may be the Intention, the Effect must frequently be to deprive an Individual of his Defence, by proving Agency, Orders for Goods, the Truth of his Assertion, or any other Fact, in the Proof of which Letters may form the chief Ingredient.

The Order, made by the *Lord Chancellor*, granting this Injunction upon a Bill, stating these to be private Letters, considers them, as written by an Individual, dissenting from their Publication, within the Principle; and observing, in what Respect the Answer has made an Alteration, though I cannot at present collect any distinct Account of the Nature and Contents of these Letters, the Case appears very materially varied: the Answer representing, that the Defendant did not deviate from the Instructions of his Employer; that he had full Authority from the Plaintiff for inserting what he did. These Facts he proposes to establish by the Letters of Lady *Perceval*; and states, that he does not believe these Letters were given under any Confidence; and, though he may derive a Profit from publishing in his own Paper, his Object is, not Profit, but the Vindication of his Character from the Imputation, that is thrown upon it.

Whatever Degree of Confidence or Reservation of Property may be implied from the Transmission of a private Letter, it would be too much to hold, that the Individual, who receives it, can in no Case use it for the Purpose of protecting himself from an unfounded Imputation; stating that to be the sole and *bonâ fide* Object of the Publication; and upon this Answer it must be taken, that the Defendant

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fendant has no Purpose of Gain, or to deprive another of the Benefit, derived from a literary Composition; but that his only Object is by proving Agency to answer the Imputation cast upon him. It is true, this Defendant does not propose to use these Letters as Evidence to establish a Right in a Court of Justice: but he is endeavouring to protect his private Character by shewing, that he has not transgressed his Authority; and this Equity stands, not upon Breach of Confidence, or the Injury to the Feelings of Parties, but upon this broad Basis, the Invasion of literary Property.

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The VICE-CHANCELLOR.

The Case, made by the Bill, is, that these Letters were sent to an Agent, in Confidence that he would not disclose or communicate them; who in Violation of that Confidence delivered them to the Defendant *Phipps* for Publication in his Paper: an Act represented as extremely injurious to the Feelings of the Plaintiffs; and upon this Bill the Injunction was granted by the *Lord Chancellor*, who however required an Affidavit by the Plaintiff as to the Fact, not stated positively; the Bill stating only, that she sent the Letters, she was required to assert positively by Affidavit, that she was the Author of them; in order to bring this Case within *Pope* v. *Curl* (*a*), the Precedent, which was exactly followed on this Occasion. Lord *Hardwicke* restrained that Defendant from printing, publishing, and vending, those Letters, of which the Plaintiff asserted himself to be the Author; but would not grant the Injunction as to those, which had been received by him from other Persons; grounding the Order upon the Copyright in those Letters, of which the Plaintiff stated himself to be the Author.

(*a*) 2 *Atk.* 342.

That

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That is the first Case, in which a Court of Equity appears to have interposed upon the Subject of private Letters; which Letters, it is observable, having been formed into a Volume, were published in *Ireland*; and the Attempt was to republish them here. Lord *Hardwicke* states, that Letters, though familiar, may form a literary Composition; in which the Author retains his Copyright; and does not by sending them to the Person, to whom they are addressed, authorise him, or a third Person, to use them for the Purpose of Profit by publishing them against the Interest and Intention of the Author; that by sending the Letter, though he parts with the Property of the Paper, he does not part with the Property of Copyright in the Composition.

That Case was followed by *Thompson* v. *Stanhope* (*a*); in which the Application was made against the Widow of Mr. *Stanhope*, and *Dodsley*, the Bookseller; with whom she had made an Agreement for the Publication of the Letters; which had been then formed into a Book, represented as forming a complete System of Education, then about to be published, of great Use to the Public; and an Injunction was granted by Lord *Bathurst*, considering those Letters as within the Principle of *Pope* v. *Curl.*

These are all the Cases in Print as to private Letters: the Cases upon Mr. *Forester's* Notes and Mr. *Webb's* Precedents not being of that Description: but another Case (*b*) of private Letters was cited by Mr. *Hart*, which was heard lately by the *Lord Chancellor* in private, of this Sort. Letters were represented to have been written by an elderly Lady, of a Nature, that made it very important to prevent the Publication; and an Injunction was granted in *Ireland*, and also here by the *Lord Chancellor*. That

(*a*) *Amb.* 737. (*b*) v. *Eaton*, 13th *April*, 1813.

Case,

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Case, however, was extremely different: for there was a Contract not to publish the Letters, but to deliver them up for valuable Consideration; a Sum of Money paid to the Defendant; who threatened to publish them, in Violation of good Faith and of that Contract with a Purchaser; who, independent of any original Copyright, had acquired the undoubted Right of preventing that Publication.

This is the naked Case of a Bill, certainly, to prevent the Publication of private Letters; not stating the Nature, Subject, or Occasion, of them, or that they were intended to be sold as a literary Work for Profit; or are of any Value to the Plaintiff. Upon such a Case it is not necessary to determine the general Question, how far a Court of Equity will interpose to protect the Interest of the Author of private Letters. The Interposition of the Court in this Instance certainly is not a Consequence from the Cases, that were cited; upon which I shall merely observe, that, though the Form of familiar Letters might not prevent their approaching the Character of a literary Work, every private Letter, upon any Subject, to any Person, is not to be described as a literary Work, to be protected upon the Principle of Copyright. The ordinary Use of Correspondence by Letters is to carry on the Intercourse of Life between Persons at a Distance from each other, in the Prosecution of Commercial, or other, Business; which it would be very extraordinary to describe as a literary Work, in which the Writers have a Copyright. Another Class is the Correspondence between Friends, or Relations, upon their private Concerns; and it is not necessary here to determine, how far such Letters, falling into the Hands of Executors, Assignees of Bankrupts, &c. could be made public in a Way, that must frequently be very injurious to the Feelings of Individuals. I do not mean to say, that would afford a Ground for a Court of Equity to interpose to prevent a Breach of that Sort of Confidence, independent of Contract and Property.

Whether the Publication of private Letters can be restrained upon Breach of Confidence, independent of Contract and Property, *Quære*.

This

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This Case, it is sufficient to say, admitting the Injunction originally to have been proper, is materially varied by the Answer; representing that the Defendant is by the Plaintiff's Conduct held out to the Public as a Person, giving false Intelligence, and never authorized by the Plaintiff to make these Communications; denying, according to the Defendant's Belief, that any Confidence was placed either in *Mitford* or in him; and for the Purpose of clearing himself, and shewing that his Intelligence was derived from this Quarter, he insists upon his Right by these Means to vindicate his Character, and protect his Property; both which he represents as in Danger of being greatly injured by holding him out to the Public as a Person publishing false Intelligence upon spurious Authority. Upon this Answer the Plaintiffs have failed to establish either Ground for the Interference of a Court of Equity, Copyright, or Confidence. If any Case is to be made against the Defendant, it cannot be upon these Circumstances in a Court of Equity: the Plaintiffs must therefore be left to do what they can at Law; and this Injunction must be dissolved.

BEALE, *Ex parte*.

1813, *May* 29.

Commission of Bankruptcy cannot proceed after the Death of the Party, against whom it issued, without a Declaration of Bankruptcy.

UNDER a Petition in Bankruptcy, the Question was, whether the Commission could proceed after the Death of the Person, against whom it issued, who had not been declared a Bankrupt: the Commissioners having gone no farther than receiving Proof of the petitioning Creditor's Debt and the Trading; having no Evidence of an Act of Bankruptcy.

Mr.

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BEALE, *Ex parte*.

Mr. *Cooke*, in support of the Petition, admitting, that there was no Decision upon this Point, observed upon the general Expression of the Act of Parliament (*a*), "after "any Commission hereinafter sued forth and *dealt in* by "the Commissioners."

The *Lord Chancellor* said, he conceived, that the Commission could not proceed, unless the Party had been declared a Bankrupt.

(*a*) Stat. 1 *Jam.* 1, c. 15, s. 17. Mr. *Christian* (Bank. Law, Vol. I. 37, N. 11) from Lord *Talbot*'s Declaration, (*Warrington* v. *Nortons*, *For.* 181), that whatever was done in pursuance of the Commission was a Dealing in it, if ever so minute, concludes, that the mere Qualification of the Commissioners is sufficient: but the Declaration of the Act is, that if, "after "any Commission of Bankrupt hereafter sued forth "and dealt in by the Commissioners *the Offender* happen to die before the Commissioners *shall distribute* "the Goods, Lands, and "Debts, of *the Offenders* or "any of them," &c. that then nevertheless the Commissioners shall "proceed in Execution in and upon the "said Commission, for and "concerning *the Offender's* "*Goods*, *Lands*, *Tenements*, "Hereditaments, and Debts, "in such Sort as they might "have done, if *the Party Offender* were living."

These Terms seem to point at a Person declared a Bankrupt, and the subsequent Disposition of his Property.

MALKIN,

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May 4.
June 29.

MALKIN, *Ex parte* (a).

An Attorney, in the common Course of his Profession purchasing and selling Estates, negociating Loans, &c. not subject to the Bankrupt Laws, as a Scrivener. Whether he is so by acting as a Scrivener, viz. receiving Property into his Trust for Commission, paid or contracted for expressly or by Implication, *Quære*.

THE Prayer of this Petition was, that a Commission of Bankrupt against *Samuel Thomas Adams*, by the Description of Builder, Scrivener, Dealer, and Chapman, may be superseded; insisting, that *Adams* was not a Builder; of which there was no Evidence; and that the Evidence in support of the Commission to prove Trading was produced from his own Books and Papers; and so far from proving that he was a Scrivener, merely proved that he was a practising Attorney, who by acting in the common and ordinary Business of his Profession obtained occasional Loans of Money for some of his Clients; who were by him charged for preparing Conveyances in the common Course of Charge between Attorney and Client.

The Acts, which were relied on as proving the Bankrupt a Scrivener, were various Transactions, in which he was concerned for several Clients, from 1806 to 1811: purchasing and selling Estates; receiving and accounting for the Interest of the Money, while in his Hands: negociating Loans on Mortgage and Annuity: receiving Bills and other Property; investing Part in Securities; and retaining Part to answer occasional Drafts.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Montague*, in support of the Petition.

Upon the Authority of *Warren*'s Case (*b*) *Adams* cannot be considered a Scrivener by being concerned in Loans of Money on Mortgage and Annuity for his Clients in the

(*a*) 1 *Rose*'s Bankpt. Ca. 406.

(*b*) 2 *Sch.* and *Le Froy*'s Rep. 414.

Course

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Course of his Business as a Solicitor. It is now settled, that, the Character of a Scrivener within the Bankrupt Laws is not constituted by merely negociating Securities, even if in these Transactions he makes the common Charges, as a Solicitor, for Attendance, and preparing the Conveyances, not for procuring the Money. In *Warren's* Case Transactions had occurred, in which he acted in no respect as a Solicitor; but there is no act by *Adams* except as a Solicitor. Here is no Instance of acting as a Scrivener; *Adams* merely looking out for Persons, who would take the Money of his Clients at Interest: the Client retaining his Money in the mean time. It is difficult to conceive, how a mere practising Attorney can be considered as a Scrivener; to which Character there seems to be two Requisites: first, receiving the Money of others into his Trust; secondly, using the Profession of a Scrivener; which is defined by Lord *Hardwicke*, in *Ex parte Wilson* (*a*), and by Lord *Mansfield* in *Willet* v. *Chambers* (*b*). The mere Trust is not sufficient alone; as a Century afterwards the Legislature made Bankers liable to the Bankrupt Laws, as Persons, who are merely Trustees. The Scrivener must endeavour to gain his living by a Profit in some Mode arising out of that Trust; that is, by receiving Procuration-money. Lord *Kenyon* in *Hampson* v. *Harrison* (*c*) says, "It is impossible to suppose, that "every Man, who receives the Money of others into his "Possession, and makes some Kind of Use of it, thereby "becomes a Scrivener." A mere Conveyancer, or an Attorney, who practises conveyancing, is by no Means a Scrivener. One solitary Instance of receiving Commission will not do; unless raising, as it may, the Inference of an Intention to deal generally: but that Inference is not to be with too much Facility collected from one solitary Act.

(*a*) 1 *Atk.* 218.
(*b*) *Cowp.* 814.
(*c*) 1 *Esp.* N. P. Cases, 555.

All

All these Instances consist merely in discovering Purchasers, or Borrowers, for Clients, who wished to purchase or lend their Money. The Evidence of *Adams* himself, which was improperly admitted by the Commissioners, as it was said, to explain his own Books and Papers, goes no farther than that he acted merely as an Attorney; handing over the Money immediately: never receiving Commission; making no Charge, except for the Conveyances, in regular Attorney's Bills. The single Circumstance, that applies to a Scrivener, is a Charge of Commission, at 5 *per Cent.* for his Trouble upon a Purchase; a mere Charge, not in pursuance of any anterior Agreement; never acquiesced in; and which upon Taxation would be struck out. There must be Procuration-money, either paid, or at least agreed to be paid.

The Lord CHANCELLOR.

Or the Nature of the Business must be such, that a Contract to pay must be implied.

Mr. *Leach*, for the petitioning Creditor.

Though a vast number of Attorneys have been made Bankrupts very adversely, this Question was never raised, until *Warren*'s Case occurred before Lord *Redesdale*. It is not easy to say, who is a Scrivener. Upon all the Authorities he seems to be a Person, who seeks a Provision by laying out the Money of others, or procuring Loans for others: but a Difficulty occurs with reference to the Nature of his Profit. According to Lord *Mansfield*, if in such Transactions he received no other Profit than he derived from the Conveyances, he was not to be considered as a Scrivener: the Profit being made as a Conveyancer; and, to constitute the Character of Scrivener, some Profit must be derived from those Money Transactions beyond the Charge for the Conveyances. The Definition, so qua-

1813. MALKIN, *Ex parte.*

lified, seems satisfactory, except, as its Accuracy is shaken by *Warren*'s Case (*a*). Lord *Redesdale*'s Opinion (*b*), "that "an Attorney or Solicitor, acting in his common and or-"dinary Business, and merely taking Procuration-money "upon a Loan, does not thereby become a Scrivener, "liable to the Bankrupt Laws," is new certainly. In no other Case is a Doubt intimated, whether an Attorney, who in addition to his Profit for Conveyances takes Procuration-money, is a Scrivener. The Proposition, that an Attorney, who was in any Degree employed as a Conveyancer, though in addition to his Profit in that Capacity he charges Procuration, is not a Scrivener, involves a Distinction very difficult in Principle. The sound Distinction is that, adopted by Lord *Mansfield*; that an Attorney, who in addition to the Profit derived by preparing the Instruments upon Money Transactions, takes also Commission or Procuration-money, may be a Scrivener.

In this Case *Adams* himself states a Charge of £150 Commission; though he relinquished it with his Attorney's Bill in consideration of being accommodated with a Loan of £1200; and in two other distinct Transactions there is a Charge of ten Guineas beyond the Profit as a Conveyancer. The Form of that extraordinary Profit, whether 5 *per Cent.* or a gross Sum, cannot make a Difference.

The Lord CHANCELLOR.

The Notion among old Conveyancers was, that a Scrivener, who drew the Deeds, could make no Charge for that; that his Procuration included all. In the Annuity Act (*c*) the Legislature, speaking of an Attorney taking

(*a*) 2 *Sch. & Lef.* 414.

(*b*) 2 *Sch. & Lef.* 426.

(*c*) Stat. 17 *Geo.* 3. c. 26, "that all and every Solicitors and Solicitor, Scriveners and Scrivener, Brokers and Broker, and other Persons or Person, who from "and

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MALKIN, *Ex parte.*

taking more than 10*s*. *per Cent*. for procuring a Loan, did not conceive, that by that Description they reached a Scrivener; as there is a distinct Description of him. I have certainly heard a Scrivener described as a Person, taking a Procuration for procuring Money; and that included all: he could not unite the two Professions, and make a double Charge. The Practice of a Scrivener charging Procuration Money arose upon this; that his Charge as an Attorney was illegal, unless he was an Attorney. Lord *Kenyon*, I remember, said, that, if an Attorney, engaged in the Affairs of a Family, laying out their Money in Mortgage, was employed only in Conveyancing, his Bill could not be taxed; as if he had carried on Suits; and Attorneys, instead of making out Bills for Conveyancing, charged Procuration, in order to avoid Taxation. My own Notion upon this Subject is, that, if an Attorney takes Procuration for Loans as well as his Fees as an Attorney, acting in the former Capacity to such an Extent as to afford Evidence of his Intention always to do so, he may be the Object of a Commission as a Scrivener. It can never be represented, that every Attorney is a Scrivener. The Professions are very different: in Fact the same Person may be both: but then it must be ascertained, in which Transactions he is the one or the other; and I very much doubt, whether the policy of the

Whether the same Person can act as Attorney and as Scrivener in the same Transaction, *Quære*.

"and after the passing of "this Act shall ask, demand, "accept, or receive, directly "or indirectly, any Sum or "Sums of Money, or any "other Kind of Gratuity or "Reward for the soliciting "or procuring the Loan, and "for the Brokerage of any "Money, that shall be actu- "ally and *bonâ fide* advanced "and paid as and for the "Price or Consideration of "any such Annuity or Rent- "charge over and above the "Sum of 10*s*. for every "£100 so actually and *bonâ* "*fide* advanced and paid, "shall be deemed and ad- "judged guilty of a Misde- "meanor."

 Law

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MALKIN, *Ex parte.*

Law would permit him to be both in the same Transaction.

Upon my View of the Case, as this Evidence is not sufficient, the proper Course is to direct an Issue, whether *Adams* was a Scrivener within the Intent and Meaning of the Bankrupt Laws.

June 29.

Two Issues were directed: 1st, whether *Adams* was a Scrivener: 2dly, whether he was a Broker(1).

(1) *Post*, 175.

1813,
June 18.

BRODIE *v.* BARRY.

Distinction as to Maintenance between an Infant and a married Woman with a separate Income: the Father, of Ability, not exonerated from Maintenance by the Infant's Property; the Husband, maintaining his Wife, and receiving her separate Income, not liable to account for more than one Year upon a presumed Agreement to subject that Fund to Maintenance.

Under peculiar Circumstances, the Insanity of the Wife, but no Commission issued, maintained in *Scotland* by the Husband, an only Child, an Infant, entitled to the Capital in the Event of surviving his Mother, upon the Husband's Application for an Allowance Inquiries were directed as to the past Maintenance, and the Husband's Ability, with due Regard to her Comfort, &c.

ALEXANDER Brodie by his Will, dated the 9th of *August*, 1810, gave his residuary real and personal Estates unto or in Trust for all his Nephews and Nieces, Share and Share alike; but with respect to the Share of his Niece *Margaret M'Niven*, the Wife of *Charles M'Niven*, the Testator gave the same to his Trustees and Executors, therein named; upon Trust to lay out the same in the Funds in their own Names; and to pay to her the

Divide

Dividends for her own sole and separate Use during her Life; and not to be liable to the Debts, Control, &c. of her Husband; and, after her Decease, in Trust for her Children.

The Testator left twelve Nephews and Nieces. Mrs. *M'Niven's* Share of his Estate was estimated at about £20,000; on which Account various Payments had been made into the Name of the Accountant-General. At the Date of the Will, and for many Years preceding, she had been, and still continued, of unsound Mind; though no Commission of Lunacy had been taken out against her. She resided with her Brother in *Scotland;* but was maintained by her Husband; who lived in *England;* and their only Child, a Son, was at the University of *Cambridge.*

Mr. *M'Niven,* the Husband, presented a Petition, stating the Circumstances; that he had not any Fortune with his Wife on his Marriage; and no Settlement had been since made on her by him; and praying a Reference to the Master, whether it would be for the Benefit of Mrs. *M'Niven,* Regard being had to the Circumstances of the Petitioner, and the State and Condition of his Family, that the Whole or any Part of the Income, arising from her Share of the Testator's Estate, should be paid to the Petitioner, or otherwise applied for her Maintenance, &c.

Sir *Samuel Romilly,* and Mr. *Johnson,* in support of the Petition.

In the Case of a married Woman, having a separate Maintenance, this Court does not proceed upon the same Principle, which governs its Discretion in the Case of an Infant; whose Father is never allowed for Maintenance, unless he appears not to be of Ability. That was never applied to a married Woman with a separate Income;

 though

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though the Husband is equally under a moral Obligation; and in this Instance there is no Doubt of his Ability. Where a Woman, entitled to Pin-money, or any other separate Income, which has been received by her Husband, has been maintained by him, the Court will not after her Death compel him to account; but will presume an Agreement between them, that, maintaining her, he shall retain that Income. This shews, that the Principle is perfectly different from that, regulating the Case of Parent and Child; in which the Father, being bound to maintain his Child, would be compelled to account: but the married Woman is considered bound to maintain herself; whence is inferred that Agreement with her Husband; which she was competent to make.

Upon this Petition therefore your Lordship will give the Petitioner either the Whole or some part of the Income, to which his Wife is entitled. Certainly there is no Case to be found under Circumstances, resembling these. There is only One Son, of the Age of 19; and no Prospect of any other Child. If Mrs. *M'Niven* and that only Child should die in the Life of the Petitioner, all the Savings of this Income would go from him; unless prevented by his Right to Administration. The Infant is entitled under the Will only to the Capital; and has no Interest in the Savings during her Life, except in the Event of his surviving her, as next of Kin. Your Lordship will consider, whether the Arrangement now proposed may not be beneficial even to him.

The Lord CHANCELLOR.

This is a Case of great Importance and Delicacy. Upon the Facts, stated by this Petition, the Testator must be supposed to have been aware of the Situation of this Lady; and the Terms of the Will therefore are in direct Opposition to this Application. Suppose, she was in this

Country,

Country, and a Commission taken out, the Consideration would arise, what is to be done with this separate Estate, as to making it contribute to her Maintenance, or not. It is true, that, if the Husband receives from the Trustees her separate Maintenance, the Court will not charge him with more than one Year's Income; but that is upon the Notion of her Consent to make it a common Fund for the Expence of the Family; and this is the Case of a Person incapable of consenting, and therefore not within the Rule, which guides the Court in those Instances. If a Commission was taken out, I must look at the substantial Benefit of the Object of it; and must therefore consider the Extent, not only of the Husband's Means, but of his Obligation to maintain her; and, if the Law would not compel him to contribute to her Comfort in the Degree, in which he ought, I should not scruple to direct the Committee to apply a Part of her separate Income: but that I could do only by Arrangement.

Upon this Application I can go no farther than to direct a Reference to the Master, to inquire who has maintained Mrs. *M'Niven*, and at what Expence; and how far her Husband is able and willing to maintain her; and, if any Part of this Fund is to be advanced to any one, what Securities should be taken for its due Application; not at present determining either to go to that Extent, or to stop short of it. I have searched; and can find no Authority, in the least governing me in a Case of this Nature. Without Prejudice therefore to the Question, what may be done hereafter, I will direct that Inquiry, how she has been maintained, and at whose Expence, since the Testator's Death; whether her Husband is of Ability to maintain her, due Regard being had to her Comfort; and whether any of this separate Maintenance should be applied for her Use, to whom, and upon what Securities. There is a Distinction between the Application of a Stranger, and of the

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Husband himself, able to maintain her, and not maintaining her, as he ought; in which Case I would dismiss his Petition.

1813, *June* 18, 22.

BISHTON v. BIRCH.

Injunction against proceeding at Law is gone by the Master's Report, that the Answer is sufficient; and is not sustained by Exceptions. The Order extending it to stay Trial, which in the Court of *Chancery* is a distinct Order, falls also, as a Part of the original Injunction, without a Motion to dissolve.

A MOTION was made to discharge the Order, extending the Injunction to stay Trial upon the Defendant's Submission to Exceptions to the Master's Report, that the Answer was sufficient (*a*).

Mr. *Richards*, Mr. *Leach*, and Mr. *Heald*, for the Defendant, in support of the Motion, contended, that the Answer to the Application to extend the Injunction to stay Trial was, that there was an Answer upon the File: if it depended upon the Form, the Instant the Report certified the Sufficiency of the Answer the Injunction was gone: but the substantial Question was, whether the Pendency of Exceptions is a Ground for sustaining the Injunction; the contrary of which had been lately determined.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Fisher*, for the Plaintiff, insisted, that the Defendant having, when this Order was made, submitted to the Exceptions, admits, that his Answer was insufficient: it is perfectly settled, that an insufficient Answer is no Answer; and the best Evidence is the Defendant's Admission.

The Lord CHANCELLOR.

Upon the Motion for an Injunction to stay Trial I apprehend, the Language of the Order is, that the Injunction shall be extended. If then the Injunction is gone by

[41]

(*a*) See this Case *ante*, Vol. I. 366.

the

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BISHTON v. BIRCH.

the Report, that the Answer is sufficient, the Injunction as extended to stay Trial, must be gone also; and I do not recollect an Instance of a Motion to dissolve an Injunction to stay Trial.

Mr. *Richards*, in Reply, admitting there was no such Instance, said, the Understanding in the Six Clerks' Office was, not that the second Order is an Emanation from, or Continuation of, the first, but that there are two Orders; and therefore, when the Injunction has been extended, there must be a distinct Motion.

The Lord CHANCELLOR.

If the Object of this Motion is to settle the Practice, it will not have that Effect; as I do not recollect in my Experience any Case of this Sort; and from that Circumstance I collect, that such a Case as this is not likely to occur again; standing by itself upon the Circumstances. The Course of the Court I take to be this: that, if the Defendant to a Bill for an Injunction to stay Proceedings at Law, being served with a Subpœna, does not appear, or craves Time, the Plaintiff moves for an Injunction; which does not stay the Proceedings at Law, if they had commenced before the Suit in Equity, as far as regards the Trial; but stays Execution only. That Injunction must be first obtained, before the Plaintiff can apply to extend the Injunction to stay Trial (1); for which Purpose is not sufficient to state, that, the Defendant has not appeared, or answered; but the Plaintiff must make an Affidavit (2), that the Discovery he expects from the Answer will assist him at Law; and upon that the Injunction is extended to stay Trial (*a*).

Injunction against Proceedings at Law, commenced before the Suit in Equity, stays Execution only: but extended to stay Trial on Affidavit, that the Discovery expected will assist the Plaintiff.

(*a*) See *Pearson* v. *Garlick*, 10 *Ves.* 450. *Nelthorpe* v. *Law*, 13 *Ves.* 323, as to the different Practice in the Court of *Exchequer*.

(1) *Wright* v. *Brains*, 2 *Cox*, 232.

(2) *Hartley* v. *Hobson*, *Cox*, 117.

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v.
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Motion on Answer to dissolve Injunction *Nisi*: Plaintiff shewing Exceptions for Cause, must procure the Report in four Days: but the Time is extended by Courtesy.

If this stood merely upon those Circumstances, the Defendant upon the Answer coming in would move to dissolve the Injunction, unless Cause; in those general Terms; not taking Notice of the Injunction, as extended to stay Trial; and upon that Motion it is of no Consequence, whether the Answer has come in an Hour, or a Week, before the Motion; as, a Day to shew Cause being given, the Plaintiff may see, whether the Answer is sufficient; and then may either shew Exceptions for Cause, or may shew Cause upon the Merits at the next Seal; and, if he takes the former Course, he comes under the Obligation to procure the Master's Report in four Days (1), which Time, we know, is extended by Courtesy: but, when the Answer is reported sufficient, the Injunction is gone without farther Motion; and, if so, that is of itself a very strong Circumstance to shew, that a Case of pressing Injustice must be shewn to call upon the Court to revive it on the mere Ground, that Exceptions are taken to the Report; and upon general Principles there is much less Mischief in considering the Master's Report conclusive, where the Court is interposing by Injunction against proceeding at Law, than in having Exceptions upon Exceptions, first to the Answer, then to the Master's Report, then in the Shape of Re-hearing, and lastly an Appeal to the House of Lords.

When Exceptions are shewn for Cause, if the Master reports the Answer sufficient, I have no Recollection of any Instance, that, as there are two Injunctions, first, for Want of an Answer, and secondly to stay Trial, the former being disposed of by the Report, a Motion has been made to dispose of the second; as, if that is to extend the former Injunction, the necessary Effect of removing the former, which is the Foundation, is, that the Superstructure is also removed.

(1) *Botham* v. *Clarke*, 2 *Cox*, 428.

Then

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Then the only Question is, whether this particular Case falls within these general Rules. It was intimated, that the Motion to extend the Injunction to stay Trial upon Affidavit, that material Discovery was expected from the Answer, should not be granted; as, being to stay Proceedings at Law until Answer, there was no Want of an Answer; which had been filed an Hour before. The Difficulty, that struck me upon that, was, that it is of great Importance, that the Plaintiff should have some Means of knowing, whether it is an Answer; and I recollected Cases of Answers, merely denying Combination, or stating some Fact, perfectly immaterial (*a*), giving no Assistance as to the Purpose of staying the Trial; and I found a Note of a Case before Lord *Hardwicke*, upon which I stated some Observations; finding it necessary to reserve my Judgment. In the mean Time the Defendant did not move to dissolve the Injunction, unless Cause; putting the Plaintiff to shew Exceptions for Cause, or to shew Cause upon the Merits: but the Plaintiff filed Exceptions; and the Defendant answered them; which was a Confession by the Defendant, that the Answer he had filed was an insufficient Answer; and, if that was so, there was no Reason for discharging that Order: but then the Peculiarity of this Case has put the Parties in a Situation, of which I never remember an Instance. The general Rule is, that the Defendant must move to dissolve the Injunction, unless Cause: but that cannot apply, where the Parties have so transacted, that of the ordinary Causes against dissolving an Injunction one cannot be used: viz. Exceptions to go before the Master. On the other Hand the Defendant by putting in his Answer, as he did, has put the Plaintiff in this Situation, that he had no Opportunity of shewing Cause upon the Merits.

(*a*) See *Smith* v. *Serle*, 14 *Ves.* 415.

The

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The proper Course in this particular Case seems to be a Motion to dissolve the Injunction: then I will hear them upon the Merits, and also upon this, which I shall consider open, as a preliminary Question, whether I ought to hear them upon the Exceptions: but upon the Merits I am bound to hear them.

The Plaintiff's Counsel applying for an Order *Nisi*, the *Lord Chancellor* said, he was not entitled to an Order *Nisi* by the Course he was proceeding in: but, if pressed for Time, he should have it.

June 22.

The *Lord Chancellor* declared his Opinion, that, when the Master reports the Answer sufficient, the Injunction is gone; and an Appeal from his Judgment will not support it.

The Injunction was accordingly dissolved.

BROOKMAN *v.* HALES.

ROLLS.
March 19, 22.

Renewal of a College Lease by Tenant for Life, with a Power of Appointment, in her own Name, and at her Expence, has not the Effect of an Appointment in her own Favor.

By the Death of her Appointee, therefore, in her Life, a resulting Trust by Lapse for the Representative of the Author of the Power.

SIR *William Lynch*, being seised of real Estate, and possessed of a Leasehold Estate, held under *St. John's* College, *Cambridge*, for a Term usually renewed at the End of seven Years, by his Will, dated the 14th of *October*, 1783, gave all his Estate and Effects, both real and personal, to Trustees, in Trust to permit his Wife to hold and enjoy the Premises, thereby devised and bequeathed, and receive the Rents, Issues, Dividends, and Profits, thereof to and for her own proper Use and Benefit, for and during the Term of her natural Life, without Impeachment of Waste; and from and after her Decease then in Trust to grant, convey, assign, and transfer, the whole and every Part of the said Premises unto and amongst such Person or Persons, and subject to such Provisoes, Conditions, and Limitations, as his said Wife should by her last Will and Testament, in Writing, or by any Deed or Instrument under her Hand and Seal, duly executed and attested, give, devise, bequeath, limit, direct, or appoint; and in default or for want of any such Disposition or Appointment, so to be made by his said Wife, as aforesaid, and as to all and singular, or such Part or Parts of, his Estate and Effects above devised and bequeathed, whereof no Gift, Devise, Bequest, or Appointment, shall happen to be made by her, as above mentioned, upon Trust to grant, convey, assign, and transfer, to his Brother, Dr. *John Lynch*, his Heirs, Executors, Administrators, and Assigns, respectively, for ever. The Testator appointed his Wife sole Executrix.

Lady *Lynch* by her Will, dated the 31st of *January*, 1786, in pursuance of the Power given her by the Will of the late Sir *William Lynch*, and of all other Powers and

Authorities

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Brookman v. Hales.

Authorities enabling her thereunto, gave, devised, and limited, to the Trustees named in his Will, their Heirs and Executors, all the Estates and Effects, both real and personal, of the late Sir *William Lynch*, and her own, upon Trust to grant, convey, assign, and transfer, the same in Manner hereinafter mentioned. Then, having declared a Trust for the Payment of some Annuities, and the Funeral Expences and Debts of her late Husband and herself, to be raised by Sale or Mortgage, she gave, devised, and bequeathed, all the rest, residue, and remainder, of the said real Estates to Dr. *Lynch*; and also gave to the said Dr. *Lynch* the Furniture, Books, and Linen at *Groves*; and, specifying some Pictures and other personal Property, to be sold, and the Money to be applied towards Payment of her Debts and Legacies, she directed and appointed the Trustees to grant, convey, assign, and transfer, to Dr. *Lynch*, his Heirs and Assigns, the rest, residue, and remainder, of her real Estates.

Dr. *Lynch* died in the Life of the Testatrix. Under a Decree, directing an Inquiry, what Renewals of any Leasehold Estates had been made since the Death of the Testator Sir *William Lynch*, and to whom, and what Fines had been paid upon the Renewals, &c. the Report stated, that Sir *William Lynch* at his Death was possessed of a Leasehold Estate, called *Down Court Manor*, held by Lease under *St. John's College, Cambridge*, for the Remainder of a Term of twenty Years; that it had been usual to obtain Renewals of the Leases of the said Estate from the College, at the End of every seven Years: that after the Death of Sir *William Lynch* three Renewals were granted by the College to Lady *Lynch*; namely, on the 30th of *May*, 1786, at a Fine of £306: 4*s*. paid by Lady *Lynch* out of her own Money; at which Time seven Years and upwards of the then existing Lease had expired: on the 26th of *June*, 1794, at a Fine of £800, also paid by Lady *Lynch* out of her

her own Money; at which Time eight Years and upwards of the existing Lease had expired: and on the 19th of *December*, 1801, at a Fine of £650, also paid by Lady *Lynch* out of her own Money; at which Time seven Years and upwards of the existing Lease had expired; and her personal Representatives had renewed since her Death.

The Report farther stated, that Counterparts of the Leases, granted by the College, were usually executed by the Lessees; but that such Counterparts, as well as the old Leases were usually destroyed, when new Leases were granted; and no Evidence had been produced, whether Counterparts of the Leases, granted to Lady *Lynch*, were executed by her: but she received the Rents for her Life, and paid the College the Rent reserved.

The Cause coming on for farther Directions, a Question was raised by the Defendants, the personal Representatives of Lady *Lynch*, whether the Renewals by her in her own Name and at her Expence operated as an Appointment by her in her own Favor; preventing the Effect of the Lapse for the Benefit of the Representatives of Sir *William Lynch*.

Sir *Samuel Romilly*, and Mr. *Shadwell*, for the Plaintiff.

Mr. *Hart*, Serjeant *Palmer*, and Mr. *Bell*, for the Defendants.

One Question is, whether here is not a good Appointment, and a valid Disposition in Equity; under which the Appointees in the Will of Lady *Lynch* are Trustees, for her Heir at Law, not for the Heir of Sir *William Lynch*. As to the Leasehold Estates, taking the Renewal for herself absolutely she is in no respect constituted a Trustee for

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for the Person in Remainder: her Conduct in surrendering and taking a new Lease in her own Name affords conclusive Evidence of her Purpose to acquire the absolute Interest, and to consider the Estate as her own. Her Will is a complete Disposition of all the real and personal Estate of her Husband; and all the Provisions are consistent with her Object to extinguish all Claims under her Husband's Will, and that Dr. *Lynch* should take by the Effect of her Bounty, not by the Will of his Brother. The Principle, upon which Guardians, or Trustees, renewing, are held Trustees of the new Lease, as they could not by any Mode make the original Lease their own, does not apply here. This Estate was made her own to all Intents; and there is no Equity for the Representatives of her Husband against her Representative. Though Counterparts of the Leases cannot be produced, it is very improbable that Counterparts were not executed.

Sir *Samuel Romilly*, in reply.

Here is no Appointment certainly, except by the Will. No Counterparts of the Leases were found; though it is very improbable, that there were not Counterparts; but, admitting the Existence of such Instruments, could they be considered as an Execution of the Power: a Release or Surrender under Seal of the Estate, that was the Testator's? The Effect of the Counterpart is merely the Acceptance of the new Lease, with the Covenants of the Lessee. No Counterparts however being found, it is in vain to consider this.

There is no Doubt, that the Testatrix intended to execute her Power in favour of Dr. *Lynch*; and that he should take under her Will: but her Will did not convey the legal Estate. That was already vested in the Trustees under her Husband's Will: her Power of Appointment

was

was over the equitable Interest only: and the Effect of the Death of the Appointee in the Life of the Testatrix, the Appointment being by Will, is a Case of Lapse. It is said, that, having renewed, she must be considered as absolute Owner of the Interest acquired, free from any Trust: but a renewed Lease is subject to all the Trusts, which affected the original Lease. If a Tenant for Life, with Remainder over, renews in his own Name, it is considered, not as a Breach of Trust, but as an Act done in the fair and just Use of the Property, of which he is a Trustee; taking the new Interest just as he had the old. All Persons, interested in the Lease, had a Right, if it was about to expire, to insist on her renewing; and, until she executed her Power, the renewed Lease was in precisely the same Situation, subject to the existing Trusts. No Distinction was ever made upon the precarious Nature of the Trusts; that the Party might put an end to them. The natural Course of enjoying College Leases is by regular Renewal, usually at the End of seven Years. Being, as Executrix, a Trustee for all the Purposes of the Will, she was so at the Instant of Renewal; though she might have assigned to the Trustees, named in the Will; and the same Argument, that she meant to hold for her own Benefit, not upon the Trusts of the Will, might have been equally used, if she had kept the Property in her own Hands seven Years.

The MASTER *of the* ROLLS.

It does not strike me, that the Nature of the Trust can be affected by its being combined with a Power, which remained unexercised. That is a Point, which I will consider with reference to the Leasehold Property.

The MASTER *of the* ROLLS.

Lady *Lynch* was Tenant for Life, with a Power of Ap- *March* 22.

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pointment over all the real and personal Estate of her Husband. If she had been Tenant for Life only, it seems not disputed, that the Renewal of the College Leases by her in her own Name would after her Death have enured to the Benefit of the Devisee in Remainder. Unless something has been done by her that amounts to an Execution of her Power, I do not see, how any other Act of her's can have a different Effect from what the same Act, done by a mere Tenant for Life, would have had. It seems to me impossible to consider the Renewals, supposing Counterparts were executed, as amounting to an Appointment by her in her own Favour. The Lessors demise to her; and she covenants with them: but I cannot conceive, how their Grant, or her Covenant, can be called an Appointment by her in favour of any Body. Acts of Ownership by a Tenant for Life, with a Power, do not make him Owner, unless they are such Acts as are prescribed by the Power for vesting the Property. There is therefore no Distinction between the Leasehold and the other personal Estate. So far as no Trust is declared, or the Trust fails, the Estate remains unappointed. That is the Case with respect to the Residue both of the real and the personal Estate.

LEPARD

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Power of Attorney to a Creditor to receive a Debt, not accompanying any Assignment of it, nor making Part of any Security given, but with Declarations, that it was to enable the Creditor to apply the Money to his Debt, not an Appropriation; and therefore failed by the Death of the Debtor. Assignment of Part of the Assets, and Judgment confessed, to a Creditor by one Executor not available against the Dissent of the others, on behalf of the general Creditors; though perhaps the Court would not interpose against the particular Creditor, if the Property had actually passed, or to deprive him of any legal Advantage.

WILLIAM *Vernon*, the younger, having in 1805 contracted to erect Buildings, &c. for the Board of Ordnance, and being indebted to *Goodacre* and *Buzzard*, his Bankers, to the Amount of above £8000, on the 15th of *March*, 1809, executed to *Down* and Co. their Bankers in *London*, a Power of Attorney, enabling them to procure and receive from the Board of Ordnance "all such Sum "and Sums of Money as now are, or which may hereafter "from Time to Time become, due and payable" to him. He died on the 16th of *June*, 1809; and afterwards *Down* and Co. on the 24th of the same Month received the Sum of £2600 and upwards on his Account from the Board of Ordnance.

By an Assignment, dated the 13th of *December*, 1809, *William Vernon*, the elder, as one of the Executors of *William Vernon*, the younger, assigned to *Goodacre* and *Buzzard* the Money then due or to become due to the Estate of the Testator from the Board of Ordnance, under the before-mentioned Contract, in Payment of £3485 : 12*s*: 3*d*. alledged to be due from the Estate of the Testator to *Goodacre* and *Buzzard*; and also gave them a Warrant of Attorney of the same Date, to confess Judgment *de bonis Testatoris*; on which they entered up Judgment.

Two Bills were filed: one by the two Executors of *Ver-*

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non junior, who were not Parties in that Transaction, for an Account, &c.; and another by *Goodacre* and *Buzzard*; claiming under their Assignment, Warrant of Attorney, and Judgment, to receive from the Board of Ordnance what had become due since the last Payment; and by their Answer to the other Bill insisting, that the Delivery of the Power of Attorney by the Testator to *Down* and Co. for the Use of *Goodacre* and *Buzzard* was equivalent to an Assignment of his Interest in the Money; that they therefore had a Power, coupled with an Interest; that the Money was well received by *Down* and Co. and they had a Right to apply it in liquidation of their Demand against the Testator's Estate. There was parol Evidence of Declarations by the Testator, that the Power was given to enable the Bankers to apply the Money to their Debt.

Sir *Samuel Romilly*, Mr. *Leach*, and Mr. *Wray*, for the two Executors, Plaintiffs, insisted, that the Power of Attorney, given to *Down* and Co. was vacated by the Death of the Testator; and the Executors were entitled to recover the Money, received under it.

Mr. *Hart*, and Mr. *Trower*, for the Bankers, observing, that the Bill in the first Cause was filed, not by Creditors, but by two Executors and the residuary Legatees against the other Executor and Creditors, contended, that the Power of Attorney was not revoked; that one Executor may give a Preference to a particular Creditor; that *Goodacre* and *Buzzard* did not ask the Assistance of the Court; and the Judgment, if good at Law, could not be set aside in Equity. The Case of *Hurst* v. *Goddard* (*a*) was referred to.

The MASTER *of the* ROLLS.

The Question is, to which of these Claimants the Money

(*a*) 1 *Ch. Ca.* 169.

belonged.

belonged. It is contended, that *Goodacre* and *Buzzard* are entitled to retain it; as, though *William Vernon* died, before it was received, the Power of Attorney was not revoked by his Death; that, being given to them to secure a Debt due, it was not a revocable Power. There is no written Evidence of the Purpose, for which it was given. It is a mere common Power, not accompanying any Assignment of the Debt, nor making Part of any Security given to the Bankers. There is indeed parol Evidence, that *Vernon* had declared, it was to enable them to apply the Money to the Debt, due to them. But that is not enough to operate as an Appropriation of the Money, or to prevent it from becoming Part of the Testator's Assets. In the Case of *Mitchell* v. *Eades* (*a*) the Power was made irrevocable: yet it was not allowed to be effectual against the general Creditors after the Death of the Debtor.

Power of Attorney to a Creditor to receive Money, though made irrevocable, not effectual against the general Creditors after Death of the Debtor.

The other Claim was under the Assignment by one of the Executors, *William Vernon*, subsequent to the Testator's Death. It is said, as each of the Executors has the Power to dispose of the Assets, the Assignment by one is good. If he had parted with any Portion of the Property to *Goodacre* and *Buzzard*, if by the Assignment they had obtained any legal Advantage, it could not perhaps be taken from them: but this is a mere Assignment of a Chose in Action by one of several Executors, of which no Use can be made, unless this Court shall act upon it, and interfere to give the particular Creditor an Advantage against the other Executors and the general Creditors. That the Court will not do; but will direct the Money to be paid to the other Executor for the Benefit of the general Creditors. *Goodacre* and *Buzzard* have a Judgment, it is true: but that does not make them the Persons entitled to receive the Debt; though it may give them a

(*a*) *Pre. Ch.* 125.

 Priority

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Priority in the Administration of Assets. It is for the other Creditors to consider, whether they should not make Application to the Court of Law, in which the Judgment was entered up. Upon the Case of *Elwell* v. *Quash* (a) I conceive, that Judgment will be found to be of no avail.

The Bill of *Goodacre* and *Buzzard* to have the Money paid to them must be dismissed with Costs as against the Board of Ordnance, and without Costs as against the other Executors; and upon the Bill of the other Executors the Money must be paid out of Court to them.

(a) 1 *Str.* 20.

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Trust of a Term during the respective Minorities of the respective Tenants for Life or in Tail in Possession, &c. to receive and lay out the Rents, &c. in Stock, to accumulate, for such Persons, as should upon the Expiration of such Minorities, or Death of the Minors, be Tenants in Possession, or entitled to the Rents, and of the Age of twenty-one, too remote; and, being void in its Creation, is incapable of Modification, so as to establish it in the Extent, to which it might have been originally carried.

BY Indentures, dated the 12th and 13th of *July*, 1790, Estates were conveyed in strict Settlement; subject to a Term of 1000 Years upon the following Trust:

That during the Minority or respective Minorities of any Person or Persons respectively, who for the Time being should by virtue of the Limitations hereinbefore

contained

contained be immediate Tenant for Life, in Tail Male, or in Tail, in Possession of or actually entitled to the yearly Rents, Issues, and Profits, the Trustees should receive and take the yearly Rents, &c. and pay and apply so much as should remain after answering the Payments before or after mentioned in or towards the Discharge of the principal Sums, which should then affect the said Estates, so that they might be compleatly freed and discharged from the same; and after payment of all such Charges and Incumbrances should during such Minority or respective Minorities as last mentioned, lay out and invest the said yearly Rents, &c. in the Purchase of public Stocks or Funds, or upon Government or real Securities in *England*, to be from Time to Time altered and varied as Occasion should require; and receive the Dividends, Interest, &c.; and lay out and invest the same in the Purchase of or upon Stocks, Funds, or Securities, of the like Nature, to be also from Time to Time altered and varied, so that the same might during such Minority or respective Minorities, as aforesaid, accumulate; and to stand possessed of and interested in the Sums of Money, Stocks, Funds, and Securities, to be purchased with such yearly Rents, and the Interest, Dividends, and annual Produce, respectively, and the Accumulations thereof respectively, and the Dividends and annual Produce of such Accumulations, in Trust for such Person or Persons respectively as should immediately upon the Expiration of such Minority or respective Minorities, as aforesaid, or the Death or Deaths of such Minor or Minors, as aforesaid, be Tenant or Tenants in Possession, or entitled to the Rents and Profits, and be of the Age of twenty-one Years; and that in the mean-time and until the said Rents, Issues, and Profits, should amount to a Sum competent for the Discharge of the Sums so to be discharged, the Trustees might invest the same in the Purchase of Stock, &c. and that in such Case t Dividends and Interest of such last mentioned Stock should be

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accumulated, and the same and the Accumulations thereof be laid out and invested, as last hereinbefore mentioned, till the same respectively should be applied in the Discharge of the said Sums of Money so to be discharged.

The Bill contended, that the Direction for the Accumulation of the Rents and Profits, during Minority, until there should be a Tenant in Possession of the Age of twenty-one, is illegal and void; and that, therefore, the Plaintiff, as Tenant in Tail, is entitled to all the Estates, and to all, or so much of, the Rents and Profits as should remain after discharging the Incumbrances.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Heald*, for the Plaintiff.

The Question upon the Validity of the Trust of this Term is, whether the Direction to accumulate the Rents during the successive Minorities of Tenants for Life or in Tail, until there shall be some Tenant in Tail adult, to whom the whole Accumulation is to be paid, is not too remote; as it may possibly endure much longer than the allowed Limits. It might happen, though not probably, that this Accumulation would go beyond a Century: if, for Instance, the present Lord *Southampton*, who is a Minor, should marry, and, dying under Age, leave a Minor, who might do the same. In *Griffiths* v. *Vere* (*a*) the *Lord Chancellor* lays down, as well settled, that the Possibility, that an Executory Devise may fall within the legal Limits, will not support it. This Trust for Accumulation therefore, not being within the Act of Parliament (*b*), made in consequence of the Case on Mr. *Thellusson*'s Will (*c*), must fall.

(*a*) 9 *Ves.* 127. See 134.

(*b*) Stat. 39 and 40 *Geo.* 3. c. 98. *Longdon* v. *Simson*, 12 *Ves.* 295.

(*c*) *Thellusson* v. *Woodford*, 4 *Ves.* 227. 9 *Ves.* 112. 13 *Ves.* 209.

Mr.

Mr. *Hart*, and Mr. *Roupell*, Sir *Arthur Piggott*, Mr. *Leach*, Mr. *Martin*, Mr. *Wetherell*, and Mr. *Phillimore*, for the different Defendants, claiming in Remainder: Mr. *Richards*, and Mr. *Perkins*, for the Trustees.

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This Direction for Accumulation does not necessarily include a longer Period than the Law allows; and may fall within those Limits. It is not a plain, direct, Transgression of the Law; as the Limitation in *Lade* v. *Holford* (*a*), looking to a Period of twenty-six Years. That Accumulation might proceed as long as the Estate might be made unalienable was admitted in the Case on Mr. *Thellusson*'s Will. All the Consequences, represented as flowing from this Accumulation, might happen upon any Limitations in Tail; a Series of successive Minorities preventing Alienation.

If however this Trust goes too far, it is void only for the Excess; if capable of being clearly distinguished: *Phipps* v. *Kelynge* (*b*). It is valid therefore at least, until a Tenant in Tail attains the Age of twenty-one.

Sir

(*a*) 3 *Bur.* 1416. 1 *Black.* 428. *Amb.* 476. *Fearne's* Ex. Dev. 530: Mr. *Butler*'s Edition and his Note (1).

(*b*) *Fearne's* Exec. Dev. Mr. *Powell's* Edition, 84. Mr. *Butler*'s Edition, 616.

Phipps v. *Kelynge*, 20th *July*, 1767. (Reg. Lib. B. 1766, Folio 529.)

The Duchess of *Bucks* and *Normanby*, being possessed of a Lease from the Crown for the Remainder of a Term of Thirty Years and three Days, and seised of a capital Messuage, &c. and also possessed of personal Estate, by her Will, dated the 15th of *February*, 1742, bequeathed to *William Kelynge* and others, her Executors, all her Leasehold Estates in *Yorkshire*, which she held of the Crown, in Trust that they or the Survivors, &c. should from Time to Time, during the Term of Years therein, lay out the clear

Trust of Rents of Leasehold Estate, to accumulate and be laid out in Freehold Estates, to be settled, ceased at the Age of twenty-one of the first Tenant in Tail.

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Sir *Samuel Romilly*, in Reply.

The View, taken of this Case with reference to the Incapacity

clear yearly Profits in the Purchase of Lands of Inheritance in their Names; and convey and settle the same to the Use of the Plaintiff *Constantine* during his Life, without Impeachment of Waste; with Remainder to Trustees for preserving contingent Remainders; Remainder after the Death of the Plaintiff *Constantine* to his first and other Sons in Tail Male; Remainder to the Use of *James Phipps*, Brother of the Plaintiff *Constantine*, for his Life, with Remainder to his first and other Sons in Tail Male; Remainder to the Testatrix's Godson the Honorable *Edmund Boyle*, for Life, with Remainder to his first and other Sons in Tail Male; with ultimate Remainder to the Testatrix's own right Heirs. And the Testatrix gave to her said Executors all her personal Estate whatsoever, in Trust in the first Place to pay thereout certain Annuities therein mentioned, and such other Annuities, Legacies, or Sums, as she should give or appoint, by any Deed or Codicil to her said Will or any other Writing whatsoever; and then in Trust to lay out the Remainder of her personal Estate in the Purchase of Lands of Inheritance, in the Names of them, their Executors, &c. and to settle and convey the same upon the same Persons and their Issue, and for the same Uses and Estates, as she had therein before directed touching the Lands to be purchased with the Rents of the said Leasehold Estate; and she devised all her real Estates upon the same Trusts; and directed, that, until such Purchase could be found, her said Executors should place out the Trust Monies either upon Land or Government Securities, as they should see fit; and pay the Produce thereof to such Persons as would be entitled to the Produce of the said Estate, when purchased.

The Bill prayed, among other Things, an Account of the personal Estate of the Testatrix, and of the Rents of the

capacity of Alienation from the Minority of Tenants in Tail is not accurate. That Incapacity is not produced by the

the Leasehold Premises, an Execution of the Trusts of the Will, and a Receiver; and by a Decree, made on the 12th Day of *March*, 1744, it was declared, that the Will ought to be established, and the Trusts performed, &c. *Under a private Act of Parliament the Lease was renewed out of the personal Estate of the Duchess; and the new Lease, being granted to the Plaintiff *Constantine*, was assigned to the Defendant *Kelynge* in pursuance of the Directions of the Act upon the Trusts in the Will; and the Plaintiff *Constantine John* (the eldest Son of *Constantine*,) having attained twenty-one, they obtained a farther Renewal, to commence from the Day the renewed Term of twenty-one Years would determine, at the Expence of *Constantine* the Father.

The Bill, suggesting that the Plaintiff *Constantine John* on his attaining the Age of twenty-one Years became entitled to the absolute Interest and Property in the said Leasehold Estate, devised by the Will of the late Duchess in Trust, &c. to be purchased, as the first Person entitled to take the real Estate, as Tenant in Tail Male, subject to and expectant upon the Determination of the Estate for the Life of the Plaintiff *Constanting* therein, insisted, that the Plaintiffs were entitled to have an Assignment of all the said Leases, &c. as they should appoint; and in case of the Death of *Constantine* before such Assignment that his Son the said *Constantine John* was entitled to have such Assignment made to him absolutely, or in Trust as he should appoint; and the Bill prayed accordingly.

The Defendants, the Infants, by their Answer insisted, that the Plaintiffs were not entitled to such an Assignment; and that the Rents and Profits ought to be laid out in the Purchase of Land upon the several Trusts, declared in the Will.

Lord *Camden*, C. "declared, "that the present Lease together with the two re- "newed

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the Act of the Parties, creating the Limitations; and the same Effect might follow from a Succession of Persons who happened to be Lunatics. It is said to be a Rule of Law, that Property may be incapable of Enjoyment, while it is unalienable; and, without disputing that Notion, it is sufficient, that in this Instance the Restraint of Alienation and Enjoyment is for a longer Period than the Law permits. A Limitation, so void in its Creation, was never sustained upon the Distinction, that it is void only for the Excess, except, under the late Act of Parliament, in *Griffiths* v. *Vere.* The Limitation in *Lade* v. *Holford* was not established for twenty-one Years. The Case of *Phipps* v. *Kelynge*, which is very shortly stated in *Fearne*, turned upon a different Principle: the Reason is not stated: but

"newed Leases of the Premises in question are all affected with the Trust declared in and by the Will of the late Duchess of *Bucks*; and that, as the Plaintiff *Constantine John Phipps*, the eldest Son of the Plaintiff *Constantine Phipps*, the first Tenant for Life, has attained his Age of twenty-one Years, the same ought to be assigned by the Defendants the Executors and Trustees (subject to such Mortgage or Demise as shall be made thereof by the said Defendants under the Direction of the Act of Parliament,) to the Plaintiff *Constantine Phipps*, the Father, for his Life; and from and after his Decease to the Plaintiff *Constantine John Phipps*, his Executors, Administrators, and Assigns; for that the Trust declared by the Will of the said Duchess of *Bucks* of accumulating the Rents and Profits of the Leasehold Premises to be laid out in the Purchase of Lands to be settled, as therein directed, ceased and became void on the said Plaintiff *Constantine John Phipps* attaining the Age of twenty-one Years; the Law not permitting a Leasehold Interest to be settled unalienably beyond the Time of the first unborn Person entitled thereto his or her arriving at the Age of twenty-one Years."

but the Court must have understood that as a Direction to carry the Rents and Profits as far as the Law would permit, vesting them therefore in the first Tenant in Tail: but, if this Accumulation is good for twenty-one Years, suppose the Plaintiff dies under twenty-one, to whom are the Rents during his Minority to go?

The MASTER *of the* ROLLS.

Before the Stat. 39 and 40 *Geo.* 3. c. 98, Accumulation might have been co-extensive with, but could not exceed the Limits of executory Devise: viz. until an unborn Child of a Person in being attained twenty-one: but a Limitation to vest only in the first Descendant of a Person in being, who might attain twenty-one, too remote.

In the Case upon Mr. *Thellusson's* Will it was admitted on all Sides, that Trust of Accumulation could not exceed the Limits of Executory Devise: it was on one Side strenuously contended, that it could not go so far: but it was decided, that so long as an Estate may be kept from vesting, so long Accumulation may be directed. An Estate may be kept from vesting, until an unborn Child of a Person in being attains the Age of twenty-one: but an Estate could not be limited so as to vest only in the first Descendant of a Person in being, who might attain twenty-one; as that Descendant might be the Child of an unborn Child, or a Person more remote; and the Period therefore much beyond the allowed Limits.

Accumulation exceeding the Limits of the Stat. 39 and 40 *Geo.* 3. c. 98, void only for the Excess.

That is the Direction as to the Continuance of this Accumulation: and the consequent Suspension of vesting of the accumulated Fund; as, if there should be a Succession of Tenants for Life, dying under twenty-one, the Accumulation would be to continue, and the accumulated Fund to vest only in a Person, attaining that Age, however remote the Period. To that extent it is impossible to support it: whether it can be supported to any Extent I shall not determine, until I see the Case of *Phipps* v. *Kelynge* in the Register's Book. An executory Devise, exceeding the allowed Limits, is void *in toto;* and in *Griffiths* v. *Vere* (a) it seems to have been very much taken for granted, that, independently of the Statute the same Rule would apply to a Trust of Accumulation, but the

(a) 9 *Ves.* 127.

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Object of the Statute was held sufficiently answered by cutting down the Excess. In *Phipps* v. *Kelynge* the Trust does seem supported to a certain Extent, and disallowed as to the rest. My present Impression is, that there was Room there for a Severance of the Trust into different Portions; which seems to be precluded by the Frame of the present Settlement.

The MASTER *of the* ROLLS.

May 24.

I have examined the Case of *Phipps* v. *Kelynge*; and find it is in Substance as stated in the Note in *Fearne*'s Executory Devises; but, when the Circumstances are attended to, I do not think, it will be found to be an Authority for the Proposition, that a Trust for Accumulation, exceeding the allowed Limits, is void only for the Excess. Lord *Alvanley* in the *Thellusson* Case says (*a*), that *Phipps* v. *Kelynge* is not properly a Case of Accumulation; as *Phipps* had a Right to call from Time to Time to have the Rents and Profits laid out in Lands to be settled. That certainly was so; and there was a Direction, that, until proper Purchases could be found, the Money should be laid out in Government or real Securities, and the Interest paid to the Persons, who would have been entitled to the Rents and Profits. There was therefore no Period, during which the Rents and Profits of the Leasehold Estate would have been wholly withdrawn from Enjoyment. Still to a certain Degree there was a Trust for Accumulation; as the Rents and Profits themselves are not to be enjoyed, but only the Produce thereof, when invested in Land or Securities. Whether that was a Trust wholly void, or good in Part and bad in Part, Lord *Camden* under the Circumstances of the Case had no Occasion to consider; as the eldest Son, the first Tenant in Tail, had attained twenty-one, before the Suit was instituted. He

(*a*) 4 *Ves.* 338.

did

did not quarrel with the past Application of the Rents: nor was it his Interest to do so; as his Father, the Tenant for Life, was living. All he contended against his Brothers, entitled to Estates Tail in Remainder, was, that this Sort of Accumulation should go no farther; the Leasehold Estates having vested absolutely in him, as Tenant in Tail of the Freehold, subject to his Father's Life Estate. If that was true, as it was held to be, it was immaterial, whether the Trust was retrospectively good, or not; and therefore it would be too much to construe the Declaration, that the Trust ceased and became void upon his attaining the Age of twenty-one, into a positive Decision, that until he attained that Age, it was valid and effectual; that being a Point, on which no Decision was sought by any of the Parties in the Cause.

General Rule, that Leasehold Estate limited with Freehold vests absolutely on the Birth of the first Tenant in Tail, subject to the Intention, declared or implied, that they shall go together, as long as the Rules of Law and Equity permit.

As Lord *Camden* decided, that the first Tenant in Tail became absolutely entitled to the Leasehold Estate, I do not see distinctly, how it could be held, that it vested in him only at the Age of twenty-one. The Decision upon the first Point implied, that the Leasehold Estate was to be considered as subject to the same Limitation as the Freehold, notwithstanding the Attempt to confine the successive Takers to the Enjoyment of less than the entire Rents and Profits of the Leasehold. If so, the general Rule is, that the Leasehold Estate vests absolutely upon the Birth of the first Tenant in Tail of the Freehold. The Question then would have been, whether the Direction for a modified Accumulation was to be taken as a Declaration of Intention, that the two Estates should go together, subject to such modified Accumulation, as long as the Rules of Law and Equity would permit; and whether a Court of Equity would in consequence of such Intention suspend the vesting as long as the Testatrix herself might by a specific Provision have suspended it.

In

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Under a Limitation of Leasehold Estate with Freehold the vesting of the former in the first Tenant in Tail not prevented by a Power to sell, and invest the Money in real Estate to the same Uses.

In the Case of *Ware* v. *Polhill* (*a*), where the Rents and Profits of Leasehold Estate were to go to the Persons, entitled to the Rents of the Freehold and Copyhold Estates, but with a Power to the Trustees at any Time with Consent of the Persons so entitled, or if Minors, at their own Discretion, to sell, and invest the Produce in real Estate to the same Uses. The *Lord Chancellor* held, that, notwithstanding the Power, the Leasehold Estate vested absolutely in the first Tenant in Tail from the Time of his Birth.

The present Case however is different from either of those. This is an Attempt wholly to sever the surplus Rents and Profits from the legal Ownership of the Estate for a Time, that may extend much beyond the Period allowed for Executory Devises or Trusts of Accumulation; and to give them to a Person, who may not come into Existence until after that Period. I do not see, how any Part of such a Trust can be executed. In *Ware* v. *Polhill* the *Lord Chancellor* held the Power of Sale to be void upon the Ground, that it might travel through Minorities for two Centuries; and adds (*b*), "If it is bad "to the Extent, in which it is given, you cannot model it "to make it good." In *Lade* v. *Holford* the Court did not attempt to model the Trust, and make it good in the Extent, to which it might have been well carried on in its Creation. As to the Possibility, that Lord *Southampton* may attain the Age of twenty-one, that never has been held to be an Answer to the Objection, that the Trust, as originally created, is too remote. Supposing this Accumulation allowed to go on, and he dies under twenty-one, what is to become of the accumulated Fund? The Deed says, it shall go to the first Person entitled to the Estate, who shall attain twenty-one; though there should be no

(*a*) 11 *Ves.* 257. (*b*) 11 *Ves.* 283.

such

such Person for a Century to come. As it is impossible so to dispose of it, I should thus deprive Lord *Southampton* of the Rents and Profits during the Years he had lived upon the Speculation, that he might live to take the accumulated Fund.

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My Opinion is, that this Trust is altogether void; except so far as it is a Trust for the Payment of Debts.

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The Words "Rents and "Profits" extended beyond their natural Meaning, annual Profits, to Mortgage or Sale, when necessary to effect the Object, raising a gross Sum: for Fines on Renewal therefore as well as Portions; and not controlled by the apparent general Intention to preserve the Estate entire.

Contribution of Tenant for Life to the Fine on Renewal in Proportion to his Enjoyment; not, as formerly, one-third; nor, as upon a Mortgage, confined to keeping down the Interest.

ANN *Allan* by her Will, dated the 8th of *January*, 1783, devised a Manor, &c. and several Messuages, &c. Part of the Lordship or Town of *Dalton-upon-Tees*, held by one Lease for three Lives in Trust for the Testatrix, her Heirs and Assigns, jointly with other Lands, belonging to another Person, comprised in the same Lease, from the Dean and Chapter of *York*, and all her renewable and other Estate and Interest therein, and also two Closes, &c. at *Hill-house* Farm, in the Parish of *Darlington*, held by Lease for three Lives from and under the Bishop of *Durham*, and all her renewable and other Estate and Interest therein, and all other her real Estates, &c. unto and to the Use of *James Allan*, for Life, without Impeachment of Waste; Remainder to *George Allan* (the elder) with Remainder to Trustees, their Heirs and Assigns for ever, to the Use of them and their Heirs, upon

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the following Trusts: for *George Allan*, the younger, and his Assigns, for Life, without Impeachment of Waste; Remainder to the Use of the Trustees and their Heirs during his Life in Trust to support the contingent Remainders after limited; Remainder in Trust for the first, second, and other Sons of the said *George Allan*, the younger, in Tail Male; with divers Remainders over; and the ultimate Remainder in Trust for *James Allan*, his Heirs and Assigns. The Will then proceeded thus:

" And my Will is and I do hereby desire direct and " appoint that the respective Leases from and under the " Dean and Chapter of *York* and the Lord Bishop of " *Durham* which I now have or are in Trust for me my " Heirs and Assigns at the Time of my Decease of and " in the said Leasehold Premises at *Dalton-upon-Tees* " and *Darlington* respectively shall and may from Time to " Time when and so often as occasion shall require be re- " newed and filled up when the Persons on whose Lives " the present or any future Lease or Leases thereof may " be held do or may depart this Life; and the several and " respective Fines Fees and Expences incident to or " attending every such Renewal shall be raised and paid " out of the Rents and Profits of the same respective " Leasehold Premises or by and out of the Rents and " Profits of any other Part of my said Freehold Mes- " suages Lands or Tenements in the Name or Names of " my said Trustees *Leonard Robinson* and *James Back-* " *house* or the Survivor of them or his legal Representa- " tives; and I do declare that all new and other Lease or " Leases at any Time or Times hereafter to be had or ob- " tained of the same Leasehold Premises respectively " shall at all Times during the Continuance thereof re- " spectively remain continue and be upon the same and " the like Trusts for such Person and Persons and for " such Estates, &c. as are hereinbefore expressed, &c. " concerning

"concerning my said hereinbefore devised Freehold Ma-"nors Freehold and Copyhold Messuages Tenements "Lands and Hereditaments or as near thereto as may be "and the Nature of the same respective Leasehold Estates "will admit of to the End that the same respective Lease-"hold Estates and Premises may be held and enjoyed or "go along with my said Freehold Manors Freehold and "Copyhold Estates and Premises so long as may be and "the Laws will permit."

Provisoes were added, enabling the Tenants for Life to grant Leases; and authorising *George Allan*, the younger, on coming into Possession to limit a Jointure of £200 a-year out of "the said Manors Messuages Lands Tene-"ments Hereditaments and Premises devised as afore-"said."

The Testatrix died in *October*, 1785. *James Allan* entered; and died in *January*, 1790; when *George Allan*, the elder, entered; and continued in Possession until his Death in *May*, 1808; when *George Allan*, the younger, entered, as next in Remainder.

In *January*, 1804, one of the Lives, for which the Estate at *Dalton* was held, dropt; and in 1808 another. Upon the Fall of the second Life, *George Allan*, the Tenant for Life, applied to the Trustee to raise a competent Sum by Mortgage for renewing the Lease; who refused; insisting, that by the Terms of the Will the Tenant for Life was bound at his own Expence to renew. The Tenant for Life upon that Refusal renewed the Lease at the Sum of £6650; and, not having any Issue, filed the Bill against the Trustee aud *Robert Allan*, the first existing Remainder-man in Tail; praying a Declaration, that the Fines and Fees of Renewal ought to be raised by Sale or Mortgage of a competent Part of the devised Estates,

 and

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and that the Plaintiff, having advanced the Sum of £6650 for such Renewal, ought to be an Incumbrancer thereon for the same or some Part thereof; and that a Mortgage might be accordingly executed.

Sir *Samuel Romilly*, and Mr. *Roupell*, for the Plaintiff.

The Objection of Laches in not renewing, when the first Life dropped, is no more applicable to the Plaintiff than the Defendant *Allan*; as it was no more incumbent on the former than the latter to call on the Trustee to renew. The settled Doctrine of Equity is, that a Sum of Money, directed to be raised out of the Rents and Profits, without any particular Indication of annual Profits, must be raised by Sale or Mortgage: a Doctrine, that Lord *Hardwicke* expressly recognises in *Green* v. *Belcher* (a); observing also upon the Effect of a certain determinate Time for raising the Money, as affording an additional Argument, that it was not intended to be raised out of the annual Profits. There are many other Authorities, rejecting for this Purpose the Distinction between annual and general Profits; establishing, that the Rents and Profits of an Estate are the Estate itself in this Sense, that a Devise of the Rents and Profits will carry the Estate: *Backhouse* v. *Middleton* (b), *Lingon* v. *Foley* (c), *Ivy* v. *Gilbert* (d), *Trafford* v. *Ashton* (e), *Baines* v. *Dixon* (f). Here, it is true, there is no particular Time limited for raising the Fine: the Period is necessarily uncertain; depending on the Lives: but suppose immediately after the Death of the preceding Tenant for Life, and before the Plaintiff had received any Part of the Rents and Profits, a Life had

(a) 1 *Atk.* 505.
(b) 1 *Ch. Ca.* 176.
(c) 2 *Ch. Ca.* 205.
(d) *Prec. Ch.* 584. 2 *P. Wms.* 13, S. C.
(e) 1 *P. Wms.* 416. 2 *Eq. Ca. Ab.* 641, pl. 8.
(f) 1 *Ves.* 42. *Johnson* v. *Arnold*, 1 *Ves.* 171.

dropped;

dropped; was it incumbent on him to advance the Fine for Renewal out of his own Money? If the Tenant for Life has this Burthen attached to his Estate, he may not only be deprived of all Benefit, but may even sustain a Loss: a Consequence hardly to be reconciled with the Benefit plainly intended for him. In this Will nothing can be found, indicating, that the Testatrix meant annual Profits; a Construction inconsistent with the whole Context, and the obvious Intention. As the Rents and Profits of many Years would be requisite to discharge the Fine, the Testatrix could not mean, that the Tenant for Life should advance it; taking his Chance of being reimbursed, if he should live several Years.

The Consequence is, that the Plaintiff, having advanced the Fine, must be considered an Incumbrancer, having an equitable Lien on the Estate for the Amount; as he cannot have Recourse to the Assets of the deceased Tenants for Life. In no other Way can a Fund to answer the Fines be said to exist; unless, which is a very improbable Case, there should accidentally be Rents, adequate to the Purpose, in arrear. It is not an immaterial Circumstance, that the Fines are to be paid by the Trustees, who take nothing until after the Deaths of the two first Tenants for Life; and those Trustees have the legal Estate in Fee. The avowed Object of the Testatrix to perpetuate this Estate in a particular Course of Devolution, was not left to depend upon the Caprice or Interest of the Tenant for Life to renew or to forfeit the Lease. The Difficulty as to the Proportion of the Contribution, is determined by the Case of *White* v. *White (a)*.

Mr. *Leach*, and Mr. *Wray*, for the Remainder-man in Tail: Mr. *Raithby*, for the Trustee.

(a) 4 *Ves.* 24. 5 *Ves.* 554. 9 *Ves.* 554.

This is a mere Question of Intention. The Will indicates an anxious Desire by a long Course of Limitations to perpetuate these Estates in the Family of the *Allans;* and the Mode proposed for securing that Object embraces even a Sale. Can a "new Lease" be intended of the Property, diminished by a Sale: or is not the general Intention clear, that the same Leasehold Estates undiminished should descend in Succession according to the Limitations of the Freehold? That Intention imposes upon each Tenant for Life, coming into Possession, the Condition of providing for Renewals.

Where the "Rents and Profits" have been held to mean the Estate itself, the Court has been forced to that Construction by particular Circumstances, and to effectuate the general Intention. Where a Portion has been given out of Rents and Profits, the Object frequently could not be effected at the particular Time, when it was required, by the gradual Application of annual Rents. So, the Payment of Debts requires a larger Construction of the Words "Rents and Profits;" giving the Means of immediate Payment by Mortgage or Sale.

In the Note (*a*) to *Trafford* v. *Ashton* Mr. *Cox* observes, that the natural Meaning of the Word "Profits" is "annual Profits;" and that the Cases, extending it farther, are Exceptions out of the general Rule. In *Ivy* v. *Gilbert* (*b*) the *Lord Chancellor*, not stating a Doctrine applicable merely to that Case, but laying down the general Rule, says, "that the natural and primary Interpretation "of these Words, out of the Rents, Issues, and Profits, is

(*a*) 1 *P. Wms.* 419, Note 1. See also Mr. *Raithby*'s Note, 1 *Vern.* 104, and Cases there cited; and the Note 2 *Ves. jun.* 481, to *Earl of Albemarle* v. *Rogers*. *Bootle* v. *Blundell*, 1 *Mer.* 193.

(*b*) *Prec. Ch.* 584. 2 *P. Wms.* 13, S. C.

'out

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"out of the Rents, Issues, and Profits, as they arise, and "not by Anticipation." The other Cases emphatically mark the same Distinction; that "Rents and Profits" generally mean annual Rents and Profits; and, where differently construed, form an Exception. The only Case, resembling this, is *Stone* v. *Theed* (a), where there was something indicating an Intention to impose a Burthen on each Tenant for Life; but the Evidence of that Intention is much below the positive Declaration of this Testatrix, that the Fines shall be paid out of the Rents and Profits. The supposed Instance of the Life dropping, before any Rents could be received by the Tenant for Life, is an extreme Case, probably never in the Contemplation of the Testatrix; and cannot therefore be coupled with her Intention. The Rents and Profits of all her Estates, not confined to her Leasehold Property, are destined to this Purpose; at least £3000 a-year; fully adequate in a very short Period to furnish the Fine for Renewal of a single Life.

The erroneous Rule, adopted in *Buckeridge* v. *Ingram* (b), that the Tenant for Life is to contribute to the Expence of Renewal no farther than by keeping down the Interest, as in the Case of a Mortgage, depending on a very different Principle, was corrected in *White* v. *White*; which has established, that the Tenant for Life is to contribute in Proportion to his actual Enjoyment, to be determined by the Duration of his Life; and that, where a Fund is provided by the Testator, that Fund must be exhausted, before the Tenant for Life can be called upon to contribute.

Sir *Samuel Romilly*, in Reply.

The general Doctrine of this Court is, that where a

(a) 2 *Bro. C. C.* 243. (b) 2 *Ves.* jun. 652.

 Testator,

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Testator, devising Freehold Leases, has given no Direction concerning their Renewal, the Tenant for Life is not bound to renew; but if he does renew, he is to a certain Extent a Trustee for those in Remainder; and has a correspondent Right to Contribution from them. Where the Testator has directed a Renewal generally, all must contribute: the Inconvenience of the Rule, stated in *Buckridge* v. *Ingram* (*a*), being clearly shewn in *White* v. *White* (*b*). A Mortgage therefore is the only proper Mode of providing the Means of Renewal; and, although the Testator may direct the Fine to be paid out of the annual Rents and Profits, so as to throw it upon the Tenant for Life, this is in Effect a Direction to renew out of the Estate, not out of the annual Rents and Profits. The Rule is accurately expressed by Lord *Hardwicke*, in *Green* v. *Belcher* (*c*), and *Baines* v. *Dixon* (*d*); and the general Doctrine of *Ivy* v. *Gilbert* (*e*) governs this Case. How could a Fine of £6000 be paid out of the annual Rents and Profits, if the Renewal became necessary at the End of half a Year? A Fine for Renewal is not to be paid by Instalments; a Mode of Payment found inconvenient for Portions, but in the other Case impossible. The Testatrix must have contemplated, as a possible Event, that a second Life might drop soon after the first, and before a Renewal had been effected. If the Tenant for Life, bound, as it is said, to renew at his own Expence, dies, before he is reimbursed, can it be contended, that he would not be an Incumbrancer to a certain Extent? The Objection, that this Estate was to be preserved entire, is met by the general Doctrine of the Court, that, where no Fund is pointed out for Renewal, a Sale or Mortgage is invariably directed. The Words of this Will shew strongly, that the

(*a*) 2 *Ves.* jun. 652.
(*b*) 9 *Ves.* 554.
(*c*) 1 *Atk.* 505.
(*d*) 1 *Ves.* 42.
(*e*) *Prec. Ch.* 584. 2 *P. Wms* 13, S. C.

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Testatrix did not mean annual Rents and Profits. She does not say, by whom the Renewals are to be made. The Expression " In the Name or Names, of my said " Trustees" is applied to raising the Fines, and the Word " raised" is inconsistent with the Notion of a Fund already existing. In *Stone* v. *Theed* the Testator speaking of the " Surplus" Rents and Profits, must be considered, as meaning annual Rents and Profits.

The VICE-CHANCELLOR.

1813, *June* 21.

This is a Case, in which the Testatrix imperatively directs Renewal; not leaving to the Option of the Tenants for Life, or the Trustees, to renew, or not. It is not therefore necessary to consider Cases, where there was no Direction to renew, or where no Fund for Renewal was provided; as there is by this Will: the Question being, what is that Fund: on the one Side it is said to be annual Rents and Profits: on the other, Rents and Profits, generally; which have been construed as importing a Power to raise by Sale or Mortgage. The Provision for Renewal in this Will is not contained in any of the successive Limitations for Life, by a Direction, as the several Devisees take in Succession, to renew, and pay the Fine; but is created by a distinct, substantive, Clause, providing generally for Renewals in all future Time; the Testatrix expressing her anxious Desire to preserve her Leasehold Property, to go as far as can be by Law with her other Estates, Freehold and Copyhold, entire, to the Persons pointed out by the Will; directing a Succession of Limitations in strict Settlement; and looking forward to frequent Renewals by the dropping of Lives from Time to Time; and directing the Fines, Fees, and Expences, incident thereto to be raised and paid out of the Rents and Profits

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Profits of the Leasehold, or any other Part of the Estates.

In construing the Words "Rents and Profits" in a Will upon such a Subject to amount to a Power to raise a gross Sum of Money, the Occasion, on which the Necessity of providing that Sum would arise, must be observed. The Time cannot be known with certainty; depending on a Contingency. Neither can the exact Amount be specified: that also depending on Contingencies; the Value of the Estate; the Contract with the Lessor; the Event, whether one Life has dropped; or more, as in this Instance. This however is clear; that, whenever the Occasion for Renewal arises, and a given Sum can be agreed upon for it, it is absolutely necessary, that it should be paid immediately; as those, who are to grant the Renewal upon that Payment, cannot be expected to wait for a gradual Payment out of the annual Rents and Profits, as they arise; but are to receive a gross Sum, to be paid immediately: that necessarily arising from the Intention to preserve the whole Property entire; which would be endangered by suffering another Life to drop.

Devise of the Profits would pass the Land.

It was fairly argued, that, though the natural Interpretation of these Words is annual Rents and Profits, and such a Direction to raise Money by Rents and Profits seems to be put in contra-distinction to Sale or Mortgage, the Word "Profits" *ex vi Termini* includes the whole Interest; as a Devise of the Profits would pass the Land itself. A Direction of this Sort, however, to raise Money out of the Rents and Profits, is not exactly the same as a Devise of the Estate under that Description by giving the Profits. The Construction cannot depend on the Effect of the Word "Profits" *per se*: which would include all the Land produces: but that Word "Profits" is to be taken, as it stands here, coupled with Rents.

Whatever

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Whatever might have been the Interpretation of these Words, had the Case been new, whatever Doubt might have arisen upon them, as denoting annual, or permanent, Profits, it is now too late to speculate; this Court having by a technical, artificial, but liberal, Construction, in a Series of Authorities, admitting it not to be the natural Meaning, extended those Words, when applied to the Object of raising a gross Sum at a fixed Time, when it must be raised, and paid, without Delay, to a Power to raise by Sale or Mortgage; unless restrained by other Words.

This Interpretation is established by a long Train of Decisions. In *Trafford* v. *Ashton* (a) the Object was to raise Portions; between which and a Fine for Renewal it is difficult to raise a Distinction; that the former creates a Necessity for immediate Payment; but the other may wait for gradual Payment out of the annual Rents and Profits. It may be farther observed, that the Words in *Trafford* v. *Ashton* "as soon as conveniently can be" might admit an Argument for the gradual Payment.

That Case refers to antecedent Cases; one of which, *Lingon* v. *Foley*, was a Devise in Trust to raise Debts and Legacies out of the Rents and Profits; and upon these Authorities the Decree was made for raising the Money by Sale or Mortgage; and this is represented to be the constant Construction of these Words in the like Cases.

In the Case of *Ivy* v. *Gilbert* (b), most fully reported in Precedents in Chancery, this liberal Construction, contrary to the natural Meaning of the Words, is stated to have become a Kind of general Rule, as applied to the

(a) 1 *P. Will.* 415.

(b) 2 *P. Will.* 13. *Pr. Ch.* 583. 2 *Bro.* P. C. 468.

Payment

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Payment of a certain Sum of Money at a fixed Time; not so much upon the Meaning of the Parties as from the Necessity of effectuating the Purpose by some Means more prompt than the gradual Accumulation of annual Rents.

Evelyn v. *Evelyn* (*a*) and *Mills* v. *Banks* (*b*) contain the same Doctrine. In the former the *Master of the Rolls* relies upon the Circumstances, that no Time was fixed, the Possibility of paying by the gradual Receipt of Rents, and the general Intention to preserve the Estate undiminished in the Male Line; a Circumstance very properly relied on here. *Green* v. *Belcher* (*c*) has Application, not in the Circumstances, but the Doctrine of Lord *Hardwicke*, as to the Construction of these Words in this Court; that, unless there are Words restraining them to the Receipt of Rents and Profits, as they accrue, the Court, in order to obtain the End, which the Party intended, has by a liberal Construction of the Words taken them to amount to a Direction to sell; and, as a Devise of the Rents and Profits will at Law pass the Lands, the raising by Rents and Profits is the same as raising by Sale.

In *Baines* v. *Dixon* (*d*) Lord *Hardwicke* goes one Step farther; intimating, that the Court had been gradually extending the Rule; until this Construction was put upon the Words " Rents and Profits" alone.

In the Case of *Lady Shrewsbury* v. *Lord Shrewsbur* (*e*), Lord *Thurlow* says, " If a Term was created to rai " by Rents and Profits, I should say it might be done by

(*a*) 2 *P. Will.* 659.
(*b*) 3 *P. Will.* 1.
(*c*) 1 *Atk.* 505.
(*d*) 1 *Ves.* 42.
(*e*) 1 *Ves.* jun. 227. See Page 234.

" Sale

"Sale or Mortgage." The Case of *Stone* v. *Theed* (*a*) proceeds, not upon any Intention of the Court to controvert the antecedent Authorities, but upon the particular Circumstances; a Trust created for paying out of the Rents and Profits Annuities, evidently intended to be paid by the Trustees out of the annual Rents and Profits; and the Surplus, there also evidently meaning the Surplus of annual Profits, to be applied to constitute a Fund for a limited, annual, Purpose, subject to which it was to accumulate; no Fund being created specifically for paying the Fine of Renewal, but merely a general Direction to renew; and the Trustees therefore having in their Hands a Fund, which they might apply without a specific Direction. Under these Circumstances it was held, that they might apply that Fund to that Purpose: but there is no Appearance of any Intention to controvert those Authorities, which have established this Rule, now become a technical Rule of Construction, not permitting the Court to exercise any Judgment.

Applying that Rule to this Will, here is nothing to confine the Construction, and to give to these Words the abridged Sense of annual Rents and Profits, except what has been fairly urged from the Words in the subsequent Clause, expressing the Purpose to preserve the Estate entire; which would be in some Degree infringed by the Consequences of the enlarged Construction. That Argument deserves some Attention: but, if two Objects appear, one to preserve the Estate entire, the other to obtain that End by a Sacrifice of Part of the Estate to procure the Means of Renewal, the Court must, as far as can be, effect both these Objects; preserving so much as can be preserved, if that can be done only by a Sacrifice of Part; and the Direction to preserve the whole must be understood con-

(*a*) 2 *Bro. C. C.* 243.

sistently

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sistently with the previous Direction to renew; as if an express Power of Sale had been given, a subsequent Direction to settle the Estate must be construed with reference to that preceding Power.

Direction to settle construed with reference to a preceding Power of Sale.

It is said, the Direction, that this shall be in the Names of the Trustees, means, that the new Leases are to be in their Names. That might be the Intention; though it is inverting the Words; which are to raise the Fines in their Names; and the next Clause supersedes the Necessity of that; declaring, that the new Leases shall be upon the like Trusts, &c. before declared.

Then, the Occasion for Renewal having arisen, the Payment to be made immediately to those, who are not bound to wait, this falls within the Principle; a gross Sum, to be raised and paid, whenever the Occasion may arise. It was properly urged, that Recourse is not to be had to Sale or Mortgage, unless there is a Necessity for it; and it does not appear, that the Fine may not be paid out of the annual Rents. The Case is possible, that the Fine might be so small as to enable the Trustees so to provide for it: but the Necessity might arise, before any Rents were received; and may occur again, before enough has come in to answer it. In this Instance the Rents are £3000 *per Annum*; and the Fine £6650. I am not aware, that an Account has been directed of the past Rents, to determine the Proportion of Contribution among the several Tenants for Life.

It is said, the Tenant for Life is in this Instance guilty of Negligence by waiting four Years, until another Life dropped; making a much larger Sum necessary. That must proceed upon the Supposition, that it was his exclusive Duty immediately to provide for Renewal: but, if the Will provides a Fund to be applied by the Trustees for

for Renewal, it was not his exclusive Duty. Difficulties also are suggested from the Union of another Estate with this; which created some Delay as to apportioning the Fine. Whether the Sum of £6650 is the proper Fine, may be the Subject of Inquiry; and if it is so, upon these Authorities the proper Direction will be to raise that Sum by Sale or Mortgage.

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Another Question is, in what Proportion the Tenant for Life is to contribute; whether it is sufficient, that he keeps down the Interest, or he must pay a Proportion of the Capital; and by Analogy to the Case of *White* v. *White* (*a*) the Court may make him contribute, not, as formerly, one-third, or the Interest only, but with reference to the Benefit he derives. There must therefore be an Inquiry, what Proportion of the Capital, as well as the Interest, with reference to the Benefit derived by the Tenant for Life, is to be paid by him.

(*a*) 9 *Ves.* 554.

KENSINGTON, *Ex-parte*.

1813, *April* 10.

DUNCAN Hunter on the 19th of *March*, 1805, deposited with the Petitioners, his Bankers, several Deeds; and signed the following Memorandum, addressed to Messrs. *Moffatt*, *Kensington*, and *Styan*, Bankers, *London*.

Equitable Mortgage by Deposit of Deeds extended beyond the original Purpose, to Advances after an Alteration of the Firm, by Implication or Parol.

Stock in the Public Funds in the Names of a Bankrupt and others on Trust: the Bankrupt being one of the *Cestuis que* Trust, his equitable Interest not within the Statute 21 *Jam.* 1, c. 19, s. 11; and therefore, not being capable of actual Transfer, passed by Assignment.

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KENSINGTON,
Ex parte.

London. "*London*, 19th *March*, 1805. Gentlemen, "Herewith I beg leave to deposit in your House the "Deeds and Policy of Assurance upon the following "Leasehold Property;" (describing it) "to remain with "you as a collateral Security for the Balance of any "Sum or Sums of Money which you may at any Time "advance for my Account, and which I hereby oblige "myself Heirs or Executors to assign in a legal Manner "whenever required so to do."

On the 25th of *September*, 1805, *Hunter* executed a Bond to the same Persons in the Penalty of £40,000, with Condition for Payment to them, and in case of any Alteration taking place in their Firm, then to the Persons composing a new Firm, if comprising two of the original Members, of all Sums thereafter in any Manner lent unto or advanced on Account of said *Duncan Hunter* by the Petitioners.

In *December* following *Moffatt* retired from the Partnership. On the 6th of *August*, 1807, *Hunter*, requiring additional Advances, deposited with the Petitioners the Title Deeds of an Estate, called *Cromwell Park;* and on the 7th of *August* signed the following Memorandum. "Messrs. "*Kensington* and Co. Gentlemen, I hereby deposit in "your Hands the Title Deeds which I hold of *Cromwell* "*Park*, as a collateral Security for any Cash Transactions "which I have had or may have with your House, and "which I agree to assign whenever I am required so to do. "*London*, 7 *Aug.* 1807."

In *March*, 1809, *Hunter*, wanting farther Advances, proposed a Deposit of other Deeds of Premises held under the Drapers' Company by Lease at a Rent of £400 a Year, and agreed to assign to the Petitioners his Interest in £3000 3 *per Cent. Consolidated Bank Annuities*, invested

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KENSINGTON, *Ex parte.*

vested in the Names of the Drapers' Company and him the said *D. Hunter*, for securing the due Payment of the said Rent of £400, and Performance of the Covenants of the Lease; and he signed the following Memorandum: "*Lon-*" *don*, 30th *March*, 1809. Messrs. *Kensington, Styan,* " and *Adams*. I have lodged in your Hands the Lease " and other Deeds belonging to the Old Stock Exchange, " which are to lay as a collateral Security for any Ad-" vances which you may make for my Account, and which " I hereby engage and promise to assign over to you in " the regular Way when required, as also £3000 3 *per* " *Cent. Consols.* which are deposited in my Name with " that of the Drapers' Company, as a Security for the " Ground Rent, and which I hereby acknowledge are also " to be transferred or assigned over to you when re-" quired."

No farther Assignments or Transfers were made. In *July*, 1811, *Hunter* was declared a Bankrupt; when a considerable Balance being due to the Petitioners, and their Application, as Mortgagees, for a Sale under the General Order being rejected by the Commissioners, the Petition was presented; praying a Declaration, that the Petitioners are to be considered as Mortgagees of the Estates and the £3000 3 *per Cents.*: that the Commissioners may take an Account of the Principal and Interest due to the Petitioners; and appoint a Sale of the mortgaged Premises, and the Bankrupt's Interest in the £3000 Stock: and that the Monies to arise from the Sales may be applied in Reduction of the Petitioners' Debt, with Liberty to prove for the Remainder.

Sir *Samuel Romilly*, and Mr. *Wilson*, in support of the Petition.

The Questions are, whether this Deposit of Title

Deeds,

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Deeds, with a written Agreement, can be held by the Petitioners as a Security for Advances after *Moffatt* retired: secondly, as to the *Bank Annuities.* Your Lordship has gone much farther in Decision than these Circumstances; having held a mutual Understanding, with reference to Securities in the Hands of the Creditor, sufficient without any express Agreement: *Ex parte Langston* (*a*); which has been followed in many Instances.

The Stock cannot be brought within the Statute of *James* 1 (*b*). It is not like a personal Chattel, passing by Delivery: being in truth a *Chose in Action.* The Bank would not take notice of any Trust. To whom was Notice to be given? The Bank are not the Debtors for *Bank Annuities*; if therefore Notice was necessary, it must be given to Government. Is Stock standing in several Names to be considered as the Stock of one becoming Bankrupt? The Effect as to Transfers in Marriage Settlements must be considered. If however it could be considered within the Statute, that cannot be under these Circumstances.

Mr. *Leach,* and Mr. *Montague,* for the Assignees.

Here is no Agreement, that this Deposit in *March,* 1805, should be a Security to the new House, formed afterwards by a Change of the Firm. At least there must be a clear verbal Contract. Here is no written Agreement, and no verbal Contract of any Description.

The Stock is within the Statute of *James* 1. The Books are the best Evidence of the apparent Ownership.

(*a*) 17 *Ves.* 227. 1 *Rose,* 26.

(*b*) Stat. 21 *Jam.* 1, c. 19, s. 11.

The

1813.

KENSINGTON, *Ex parte.*

Equitable Mortgage by mere Deposit of Deeds without a Word passing.

Deeds not taken from a subsequent Incumbrancer in favor of a prior one.

The Lord CHANCELLOR.

It has been so long settled, that a mere Deposit of Deeds, without a single Word passing, operates as an equitable Mortgage; that, whatever I might have thought originally, I must act upon that as settled Law. I have often expressed my Surprise, how it came to be so settled; as judicial Decisions are to be found, that a Lien upon Deeds may exist without giving any Right at Law to the Estate; and there is a remarkable Case (*a*) in *Peere Williams*, where a prior Incumbrancer was held to have the Interest in the Estate: but the Court would not take away the Deeds from a subsequent Incumbrancer; allowing all the Benefit he could have from those Deeds, but giving him no Interest in the Estate. That Decision however of *Russel* v. *Russel* (*b*), by Lord *Thurlow*, has b eenfollowed ever since.

This is the Case, not of a mere Deposit, but a Deposit with a written Agreement; which must *primâ facie* determine the Purpose of the Deposit; and it would be stretching the Expression much to construe that as an Engagement, that would affect the Deeds, not only with regard to the Money advanced by the old House, but the Advances, afterwards to be made by the House, whenever the Partners should be changed. It must therefore be considered as having been originally only a collateral Security for any Money, that might become due, from the House, while the Partners remained the same.

In the Cases alluded to I went the Length of stating

that,

(*a*) *Head* v. *Egerton*, 3 *P. Will.* 279. See *Evans* v. *Bicknell*, 6 *Ves.* 174.

(*b*) 1 *Bro. C. C.* 269. See *Ex parte Montfort*, 14 *Ves.* 606, and the References in the Note (*a*). *Ex parte Coombe*, 17 *Ves.* 369. *Hankey* v. *Vernon*; *Edge* v. *Worthington*; *Ex parte Bulteel*, 2 *Cox* 12. 211. 243.

1813. KENSINGTON, *Ex parte.*

that, where the Deposit originally was for a particular Purpose, that Purpose may be enlarged by a subsequent parol Agreement; and this Distinction appeared to me to be too thin, that you should not have the Benefit of such an Agreement, unless you added to the Terms of that Agreement the Fact, that the Deeds were put back into the Hands of the Owner, and a Re-delivery of them required; on which Fact there is no Doubt that the Deposit would amount to an equitable Lien within the Principle of these Cases.

In this Case a Bond was given, dated the 25th of *September*, 1805; at which Time they stood with a written Contract, affecting these Deeds and the Estate only to the Extent, in which *Moffatt* and Co. should make Advances, but with a written Contract, arising from the Bond, for a personal Obligation for the Advances, not only of that Partnership, but of any other, of which two of the original Members constituted Part. *Moffatt* retired from the Partnership in *December* following; and this considerable Difficulty occurs in the Case. Understanding alone, unless in a fair Sense amounting to Agreement, would not do; and in this Case no two of their Agreements would admit the same Construction. My Opinion however is, that, if upon the Affidavit and Examination, taken together, aided by the extreme Probability of their Intention, I can collect, that what was originally deposited for one Purpose should be held as deposited also for the other, with reference to the Demand of the subsequent Partners, that, though by Parol, would be sufficient within these Cases.

Upon the other Question, with regard to the Stock, my Opinion is extremely clear. When that Stock was placed in the Hands of *Hunter* and Co. it was upon a Trust, which must exist as long as the Lease, to which the Agreement refers. The equitable Interest was in different Persons:

sons; one being both Trustee and *Cestui que* Trust. I do not apprehend, that the Bank would take notice of an Agreement to transfer. The Bankrupt therefore having only an equitable Interest, and no Power to make an actual Transfer, his equitable Interest passed by the Agreement, without the legal Interest, which he could not part with.

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ATKINSON *v.* HENSHAW.

1812, *June* 10, 12. *Aug.* 22.

Jurisdiction of a Court of Equity for an Account of personal Estate and a Receiver, pending a Litigation for Probate; though an Administration *pendente lite* might be obtained in the Ecclesiastical Court.

THE Bill stated, that *Thomas Henshaw*, carrying on the Business of a Hat-manufacturer in Partnership with *Thomas Barker* and *George Hadfield*, by his Will and Codicils, having bequeathed three several Sums of £20,000 each for the Purpose of erecting a Blue Coat School and of establishing a Blind Asylum, under the Management of Trustees, empowering his Executors to fix the Establishment of the said Blue Coat School at *Manchester*, instead of *Oldham*, if they thought it more convenient, proceeds as follows:

" And it is my Will and Intention that the Sums which " I have bequeathed of £40,000 to the Blue Coat School " and £20,000 to the Blind Asylum (making together " £60,000) shall continue in the House or Firm at *Old-* " *ham* in conformity to and during our Articles of Part- " nership and for such longer Time as my Executors con- " sider the Principal and Interest of the said Sum secure " for the Benefit of the said Charities; it being my Will " that the Interest of the said £60,000 be paid annually " to the Trustees of the said Charities for the Main- " tenance and Support thereof."

The Testator appointed his Wife, *Sarah Henshaw*, *John Atkinson*, and *Joseph Atkinson*, his Executors. On

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the 3d of *March*, 1810, the Partnership Accounts were balanced; and the Sum of £114,881 : 3*s* : 4*d*. was found due to the Testator from the Partnership. On the 4th of *March*, 1810, the Testator died, leaving *Sarah Henshaw*, his Widow, surviving, and *Ann Hadfield*, the Mother of *George Hadfield*, his next of Kin, and Heiress at Law.

The Bill farther stated, that the Plaintiffs, *John* and *Joseph Atkinson*, took the necessary Steps to prove the Will and Codicils in the Consistory Court of the Bishop of *Chester*; and, *Sarah Henshaw* and *Ann Hadfield* having entered a *Caveat*, the Plaintiffs instituted a Suit in that Court for the Purpose of obtaining Probate; which Suit was defended by *Sarah Henshaw* and *Ann Hadfield*; and is still depending. Since the Death of the Testator *James Barker* (Brother of *Thomas Barker*) and *John Taylor* and *James Mayers Taylor* (Sons of *Sarah Henshaw*, by a former Husband) were admitted, as Partners in the Business by *Thomas Barker* and *George Hadfield*.

The Bill, alledging, that the Defendants *Sarah Henshaw* and *Ann Hadfield* had hitherto delayed the Determination of the Suit respecting the Validity of the Will and Codicils in Collusion with the other Defendants the *Barkers*, *Hadfield*, and the *Taylors*, for the Purpose of enabling them to continue in the Possession of, and use in their Trade, the said Balance of £114,881 : 3*s* : 4*d*. due to the Testator's Estate, and that the Trade had already sustained great Loss by dangerous and hazardous Speculations, prayed the Payment into the Bank to the Credit of the Cause of the said Sum of £114,881 : 3*s* : 4*d*. an Account, and a Receiver of the outstanding Property of the Testator. To this Bill all the Defendants joined in a general Demurrer.

Sir *Arthur Piggott*, Mr. *Richards*, and Mr. *D. Jones*, in support of the Demurrer.

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There is no Foundation for this Bill, by Two Executors under a Will, the Probate of which is now the Subject of a Suit in the Ecclesiastical Court. What has prevented their obtaining an Administration *pendente lite?* The Doubt that long prevailed, whether the Ecclesiastical Court could appoint an Administrator *pendente lite* concerning a Will, was settled by the great Case of *Walker* v. *Woollaston* (*a*); and it is now clearly established, that before Probate it is competent to that Court to appoint an Administrator *pendente lite*; who may bring all Actions for recovering Debts and getting in the Property; and is liable to all Suits by Creditors; to whom therefore it is competent to file such a Bill as this against Debtors to the Estate; as these Defendants are upon the Facts alleged. No peculiar Circumstances are stated, creating a Necessity for the Interposition of this Court, when that legal Remedy is open; and though before the Year 1782, while the Power of the Ordinary, notwithstanding the Practice, to appoint such Administrator, was doubted, this Court interposed, in all the Instances since that Period the Jurisdiction has been assumed only under special Circumstances; as in *Andrews* v. *Powys* (*b*); where, Probate having been obtained by a Person, alleged to have availed himself of Influence over the Testator, it seems to have been considered, that, when Probate was granted, the Ordinary was stripped of his Jurisdiction; and accordingly, in *Knight* v. *Duplessis* (*c*), on a Motion for a Receiver, Lord *Hardwicke*, acknowledging the Jurisdiction of the Ecclesiastical Court, states that to be the Ground of

(*a*) 2 *P. Wms.* 576, 2 *Str.* 614; and see *Wills* v. *Rich*, 2 *Atk.* 285. The Authority of such Administrator is merely to collect the Effects and pay Debts; not to pay Legacies: but Legacies paid *bonâ fide* would be allowed, 1 *Sch.* and *Lef.* 254.

(*b*) 2 *Bro.* Pa. Ca. 476.

(*c*) 1 *Ves.* 324.

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Andrews v. *Powys* and the Case (*a*), in 1732 before Lord *Harcourt*.

Here is no Allegation, that an Application has been made to the Ecclesiastical Court for an Administration *pendente lite*. Without any Endeavour to obtain it, or any Excuse for not making the Attempt, this Court is called upon to exercise this extraordinary Jurisdiction. Suppose an Administration *pendente lite* to be granted: what is to prevent the Administrator from filing a Bill against these Debtors? Where then is the Necessity, that might account for the Introduction of so great an Inconvenience as two clashing Jurisdictions? To induce this Court to interfere pending a Litigation, lest the Property in dispute should be lost, it is incumbent on the Party applying to shew, that the Powers of the Court, in which the Litigation is depending, are insufficient for the Purpose. Thus Lord *Redesdale* states the Principle (*b*), strongly confirmed by the Cases of *King* v. *King* (*c*) and *Richards* v. *Chave* (*d*). Admitting, that the Plaintiffs have an Interest in the Subject of this Suit, yet, as they have not a proper Title to institute a Suit concerning it, a Demurrer holds (*e*).

Lord *Redesdale* (*f*) refers to a Class of Cases to shew, that where an Executor does not appear by his Bill to have proved the Will, or appears to have proved it in an improper or insufficient Court, as he does not shew a complete Title to sue as Executor, a Demurrer will hold. In *Phipps* v. *Steward* (*g*), which is not correctly reported,

(*a*) Cited 1 *Atk.* 286.
(*b*) *Tr. Pl.* 122.
(*c*) 6 *Ves.* 172.
(*d*) 12 *Ves.* 462.
(*e*) Lord *Redesd. Tr. Pl.* p. 136. Mr. *Cooper's*, 166.
(*f*) *P.* 138.
(*g*) 1 *Atk.* 285. See the Cases cited in Mr. *Sanders's* Notes.

the

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the Object of the Prayer appears by the Register's Book to have been simply an Injunction against proceeding in the Ecclesiastical Court for Administration, until the Will should be brought over from the *East Indies:* not a general Account of the personal Estate; which could not be had without a personal Representative before the Court; and the Order granted on Motion was confined to an Account of the personal Estate in the Hands of the litigating Parties. Lord *Hardwicke*, who does not seem there to have adverted to the Cases of *Walker* v. *Woollaston*, appears in *Wills* v. *Rich* (a) and *Knight* v. *Duplessis* to have been aware of it: and referring to it, retracts, or greatly qualifies, the Doctrine in *Phipps* v. *Steward:* and the Doctrine, so qualified, admitting the Jurisdiction of the Ecclesiastical Court, was afterwards adopted in *Richards* v. *Chave* (b).

The peculiar Feature of this Case is, that this Fund is not in the Hands of the Widow and next of Kin, who are Parties to the Suit in the Ecclesiastical Court. The Allegation is, not that the Property, Securities and Papers, are in their Hands; but that they insist on Fraud, Influence, and Incapacity, of the Testator; and obstruct the Suit, with the View of keeping the Property in this Trade; and the Danger suggested is in permitting it to remain with the Debtors. That since the Case of *Walker* v. *Woollaston* is not a sufficient Reason for the Application here; as an Administrator, appointed *pendente lite* in the Ecclesiastical Court, is equally competent to collect the Property, and obviate the Danger, as your Lordship's Receiver.

Sir *Samuel Romilly*, Mr. *Hart*, Mr. *Leach*, and Mr. *Wingfield*, for the Plaintiffs.

(a) 2 *Atk.* 284. (b) 12 *Ves.* 462.

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This is a Case, singular in its Circumstances, and of peculiar Hardship; Property, of great Amount, placed in this hazardous Situation, pending a Suit in the Ecclesiastical Court, by Collusion of the Widow, the Heir and next of Kin, and the Partners in the Trade. Until the late Case of *Richards* v. *Chave* (a), where the general Proposition, laid down by Lord *Erskine*, certainly seems to shake previous Determinations, it was conceived, that a Bill for this Purpose would be sustained. The first Objection to the Remedy, proposed as a Substitution for the Aid of this Court, the Appointment of an Administrator *pendente lite*, is the Inconvenience attending such an Application in this provincial Ecclesiastical Court. What is the Course of that Application: is it made by either, or both, litigating Parties: is the Preference given to the Executor, or the next of Kin: or does the Court undertake the Responsibility of appointing its own Officer to collect Property of perhaps enormous Amount: can the Application be opposed; and is it to be the Source of a new Litigation, maintained with the same Object, to continue the Property in the Hands of these Parties; the new Partners being the Brother of one of the Survivors, and the Children of the Widow by a former Husband?

Admitting, however, that such an Appointment may be obtained, this is, according to your Lordship's Expression in *King* v. *King* (b), almost of course: and even after such Appointment a Bill would lie, not by the alledged Executor, but by the next of Kin, if not for a Receiver, for an Account, and to have the Property secured for those, who may be entitled to it. Under these Circumstances the Property cannot be represented as not in Danger. It is in the Hands of Persons, who have no Connection with it; Strangers, in whom the Testator had no Confidence; to whom his surviving Partners have

(a) 12 *Ves.* 462. (b) 6 *Ves.* 172.

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taken upon them to transfer £114,000, his Property: the Will expressly guarding against leaving half that Amount in the House longer than the Executors shall consider it secure. It is in Danger, as your Lordship has expressed it (*a*), being in the Hands of Persons, who have no Concern with it in either Event, a Will established, or an Intestacy. This Jurisdiction, which has been assumed for a long Course of Years, and has proved extremely beneficial, cannot now be relinquished. It was exercised in the Case of *Walker* v. *Wingfield* (*b*), and many other Instances, besides *King* v. *King*. *Knight* v. *Duplessis* turned upon its peculiar Circumstances.

The

(*a*) 6 *Ves.* 173.

(*b*) *Walker* v. *Walker*, 10th *May*, 1805. Reg. Lib. B. 1804, fo. 709.

The Bill stated, that *Ann Walker*, being seised of some Freehold Estates, and possessed of a very considerable personal Estate, died on the 14th *October*, 1801, intestate and unmarried; leaving the Plaintiffs her sole next of Kin; that the Defendants *William Walker* and *Harriet Mary Walker* soon after the Death of *Ann Walker*, exhibited in the Prerogative Court a Paper-writing, alledged to be the Will of *Ann Walker*; and applied to have Probate thereof granted to them as Executor and Executrix therein named: but the Plaintiffs having entered a Caveat against proving the said Will, and Proceedings having thereupon been had in the said Court, a Sentence was on the 8th *November*, 1804, pronounced; declaring, that the Paper, propounded by the Defendants, was not the last Will of *Ann Walker*; that pending the Proceedings in the Prerogative Court the Defendants or one of them under the Pretence of being the Executor and Executrix of *Ann Walker* or by some other Means got into their Possession all the ready Money and Securities and all or the greatest Part of her Effects, and also all the Title Deeds and Writings relating to her real and Leasehold Estates; that immediately upon pronouncing the Sentence by the Prerogative Court

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The Demurrer to this Bill stands upon these Grounds; first, that until Probate the Plaintiffs cannot sustain a Suit; secondly,

Court the Plaintiffs became entitled to have Letters of Administration granted to them: but the said Defendants have lodged an Appeal; and under such Pretences as aforesaid the Plaintiffs have been prevented in obtaining Letters of Administration to *Ann Walker*; so as to become her legal personal Representatives; and in the mean Time the Defendants have in their Possession all or the greatest Part of the personal Estate of the Intestate; and her Freehold Estates are very much intermixed with her Leasehold Estates; and the Title Deeds, belonging to the said respective Estates, are very much blended; and Sums of Money have been received by the Defendants, or some of them, as Rents and Profits of the real Estates, which are in fact the Rents of Chattel Estates: the Bill therefore praying to have the Property secured, and a Receiver of the Rents and Profits of the real and Leasehold Estates, and to collect and get in the outstanding personal Estate; and in case it should appear necessary for enabling the Person or Persons so to be appointed to collect in such outstanding personal Estate and to receive such Rents and Profits, that an Administrator *pendente lite* should be appointed, then that the Defendants might be directed to join with the Plaintiffs in any proper Application to be made to the said Prerogative Court to grant such Administration.

The Defendants *William Walker* and *Harriet Mary Walker* by their Answers stated, that at the Death of *Ann Walker* a Paper-writing was in her Possession, of her own Hand-writing, and signed and sealed by her, though not attested by any Witnesses, bequeathing some Legacies, and the Residue of her personal Estate and all her Mortgages and the Estates therein mentioned to the said Defendants; and appointing them

secondly, that upon an Application to the Spiritual Court Administration *pendente lite* might have been obtained; and the Administrator, so appointed, might file a Bill to have the Account taken; and the Question is, whether, as it appears, that there is a Suit depending in the Ecclesiastical Court, by reason of which Probate has not been hitherto obtained, this Jurisdiction attaches; founded upon the Fact, that the Persons, named as Executors, are not by Probate Executors; and an Administrator *pendente lite* might be granted; the Bill meaning to alledge, that the two Executors, who sue, are Co-executors with one of the Defendants, who is combining with Persons, having no Interest in the Testator's Estate, holding above £100,000 of the Assets in their Hands; and that the Object of this Suit in the Ecclesiastical Court is to delay Probate with the Intention of keeping the Property in the Hands of the Partnership, and of annulling the intermediate Exercise of that Discretion, which is to determine, whether this Sum of £60,000 is to be taken out of the Partnership or not.

them joint Executors of her Will; that they appealed from the Sentence of the said Court to the Court of Delegates; who pronounced for the Appellants; reversed the Decree; and retained the principal Cause; which is yet depending. The Answer admitted, that the Defendants had received some Part of the personal Estate, and had paid a considerable Part of it into the Bank in the Accountant-General's Name; submitting, whether a Receiver ought to be appointed to collect and get in the personal Estate of the said *Ann Walker*. The Defendant *Phillis Wingfield* claimed as Heiress at Law and one of the next of Kin.

Upon Motion the *Lord Chancellor* made the Order for a Receiver, to collect and get in the outstanding personal Estate, with the usual Directions; and that the Defendants should deliver over to the Receiver all Securities and Books and Papers relating thereto, &c.

Many

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Many Cases were cited: which clearly establish, that previously to *Walker* v. *Woollaston* there was no Doubt of the Jurisdiction of this Court in the mean time, before Probate, to collect the Funds, as far as can be, by its Receiver, that is, by Means, which this Court has, and the Ecclesiastical Court has not; in order to preserve them, to be disposed of according to the Title.

If this Jurisdiction prevailed previously to *Walker* v. *Woollaston*, the next Question is, whether that Case, determining, that an Administrator *pendente lite* has such Power, is to be taken as destroying the Jurisdiction, which up to that Time had been asserted. After much Consideration upon that I found it impossible not to admit, that there is considerable Authority both Ways: but upon all the Principles, Authorities, and Doctrine, I cannot find a Ground for holding, that, as there may be an Administrator *pendente lite*, this Court shall not exercise the same Jurisdiction it would have exercised, when it was not understood, that such an Administrator would have all the Powers until Probate or a complete Administration, that are necessary to preserve the Estate. The Difficulty upon that is, that in ordinary Cases, if this Court for the Benefit of the Parties gives a Receiver, it is upon this Ground, that the Ecclesiastical Court cannot do that, until the Suit comes to its End; which may be the Subject of Appeal; and without any Intention of Delay might necessarily consume much Time; during which the Property might be wasted; and upon that Principle among others this Court has interposed.

Admitting however, that, if there is an Administrator *pendente lite*, there is no Occasion for a Receiver, a Proposition liable to some Doubt, is there in this Instance an Administrator *pendente lite*: or when is there to be one; and is it proved, that a Suit for that Purpose is instituted; in

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in which the Fitness or Unfitness of the Person may be canvassed? Much Destruction of Property may take place before the Appointment of such an Administrator. There is, I admit, a Distinction, whether after Answer a Receiver shall be appointed, or not. The Objection would be, that both are interested: and if they would agree to the Appointment of an Administrator *pendente lite*, there would be a Person clothed with Authority to get in the Property (1).

Taking this to be a good Objection in ordinary Cases, that an Administrator *pendente lite*, might be appointed, in *Morgan* v. *Harris* (*a*) Lord *Thurlow* held, that, if any Fraud stood in the Way of the Ecclesiastical Court's acting with Effect, that would certainly give Jurisdiction. In that Case the Release was alledged to have been obtained by Fraud: the Ecclesiastical Court could not deal with it: but Lord *Thurlow* thought, that the Allegation of Fraud ousted the Application of all the Cases, in which it was held, that the Court would not act, until an Attempt had been made to obtain an Administration *pendente lite*. I must upon the Argument of the Demurrer take the Allegations of the Bill to be true (2); and it alledges, though in very inaccurate Terms, as gross a Case of Fraud as can be, with the View of preventing the Ecclesiastical Court from giving the Character, which, it is said, the Plaintiffs ought to have: one Defendant being a Person intrusted with the Discretion to determine, whether this Sum of £60,000 is to remain in the Partnership, in which two of her own Sons, having no Interest in the Testator's Estate, are concerned; and the whole Ob-

On Argument of Demurrer the Allegations of the Bill taken as true.

(*a*) 2 *Bro.* C. C. 121.

(1) On the Power of an Administrator *pendente lite* appointed by the Ecclesiastical Court, see 1 *Sch.* and *Lef.* 254; and see *Molineaux* v. *Bird*, *Mosel.* 235.

(2) *Mitf.* Pl. 172. (2d Ed.)

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ject of the Suit in the Ecclesiastical Court being to delay Probate. That is a Case of Fraud; and though the Bill is inaccurate, it brings forward upon the whole Circumstances, that form a Case of Exception, if that is necessary; and I cannot find a Ground, which previously to the Decision of *Walker* v. *Woollaston* would have induced this Court to interfere before Probate, on which it ought not to interfere, though Administration *pendente lite* might be obtained, unless the Proceeding for that Purpose does not admit any of that Litigation, which would introduce the same Danger, that existed in the Reasoning of the Court in that Case. This Demurrer must therefore be over-ruled (*a*).

(*a*) See *Ball* v. *Oliver*, the following Case, and *Gallivan* v. *Evans*, 1 *Ball* and *Beat.* 191.

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BALL *v.* OLIVER.

Jurisdiction of a Court of Equity pending a disputed Administration in the Ecclesiastical Court to protect the Property by a Receiver not ousted by the Power of the Ecclesiastical Court to appoint an Administrator *pendente lite*.

THE Bill stated, that *John Oliver*, being possessed of considerable personal Property, on the 28th of *November*, 1811, died intestate, a Bachelor; leaving the Plaintiffs his Brother and Sisters of the Half-blood, and only next of Kin; that the Defendant *Catharine Oliver*, representing herself to be the lawful Daughter of the Intestate, obtained Letters of Administration; and took Possession of his personal Estate; upon which the Plaintiffs instituted a Suit in the Ecclesiastical Court for the Purpose of getting these Letters of Administration recalled, and of obtaining Administration; which Suit is still depending. The Bill, charging, that the Defendant is insolvent, prayed an Account, and an Injunction, restraining her pending the Suit in the Ecclesiastical Court from getting in or disposing of the personal Estate. The Defendant by

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by her Answer, insisting on her Legitimacy, denying the Charge of Insolvency and the Plaintiff's Right as next of Kin, moved to dissolve the Injunction (*a*).

Sir *Samuel Romilly*, and Mr. *Roupell*, in support of the Motion.

Mr. *Heald*, for the Plaintiffs.

The VICE-CHANCELLOR.

July 2.

As there is some Difference in the Authorities upon this Subject, I wished to look into them, particularly *Richards* v. *Chave* (*b*): a Case, not of an Administrator, but of an Executor, before Probate; and Lord *Erskine*'s Judgment was against granting a Receiver: but in the Argument Mr. *Leach* mentioned a contrary Decision, *Liddell* v. *Liddell*. I am relieved however from an Inquiry into the Authorities; having seen a Note of a recent Case, *Atkinson* v. *Henshaw* (*c*); in which they were all brought under the Consideration of the *Lord Chancellor;* who, having taken Time for Consideration, delivered a very full Opinion upon this Subject; and appears to have persevered strongly in his Judgment, expressed on a former Occasion (*d*). The first Case, that has relation to this Subject, is there referred to: *Walker* v. *Woollaston* (*e*): a Decision in the Court of *Common Pleas*, affirmed upon a Writ of Error in the *King's Bench*, that an Administrator *pendente lite* in the Spiritual Court concerning a Will has the Power to bring Actions for recovering Debts: a Question, which, after much Fluctuation, was then finally settled;

Power of Administrator *pendente lite* to bring Actions for recovering Debts.

(*a*) See *Gallivan* v. *Evans*, 1 *Ball* and *Beat*. 191, and *Atkinson* v. *Henshaw*, *ante*, the preceding Case.

(*b*) 12 *Ves*. 462.

(*c*) The preceding Case.

(*d*) *King* v. *King*, 6 *Ves*. 172.

(*e*) 2 *P. Will*. 576.

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settled; and *Lee*, Justice, having at first expressed Doubt, finally concurred with the rest of the Court in the Opinion, that the Administrator has such Power.

In *Phipps* v. *Steward* (*a*) Lord *Hardwicke*, citing *Powis* v. *Andrews* (*b*) and a former Case of *Japhet Crooke*, in the Time of Lord *Harcourt*, asserted the Jurisdiction of this Court to interpose notwithstanding *Walker* v. *Woollaston*. In *Knight* v. *Duplessis* (*c*) however his Lordship refused to grant a Receiver; referring to those Cases; and upon the Ground, that an Application might be made to the Ecclesiastical Court for an Administrator *pendente lite*, thought this Court ought not to interpose; admitting expressly, that the Application is proper, and the Jurisdiction to be exercised, where the Suit is instituted after Probate; as after Probate the Ecclesiastical Court could not grant an Administrator *pendente lite:* so that there is no other Method for the next of Kin against a Will obtained by Fraud. In *Wills* v. *Rich* (*d*) a Receiver was appointed, while the Will was in Controversy in the Commons: Lord *Hardwicke* however observing, that the Ecclesiastical Court in Cases of controverted Wills appoints an Administrator *pendente lite* to take care of the Estate; referring to *Walker* v. *Woollaston*, as settling the Point of his Authority to bring Actions; having in *Phipps* v. *Steward* stated the Ground of this Jurisdiction; that the Ecclesiastical Court has no Way of securing the Effects in the mean time.

[99] Thus it stood until the Decision by the present *Lord Chancellor* in 1801 in *King* v. *King* (*e*): a very strong Case certainly; where there is a Reference to Lord *Redesdale* (*f*); who states, as the common Course, that during

(*a*) 1 *Atk.* 285
(*b*) 2 *Bro.* P. C. 476.
(*c*) 1 *Ves.* 324.
(*d*) 2 *Atk.* 285.
(*e*) 6 *Ves.* 172.
(*f*) Treat. Plead. 122, 123.

a Suit in the Ecclesiastical Court for Administration of the Effects a Court of Equity will entertain a Suit for the mere Preservation of the Property, until the Litigation in the Ecclesiastical Court is determined; and though it was objected that the Ecclesiastical Court might appoint an Administrator *pendente lite*, the *Lord Chancellor* did not conceive that to oust the Jurisdiction; stating the Appointment of a Receiver to be almost of course, where it is in Dispute, who is the personal Representative; where the Matter is in Controversy in the Spiritual Court; as whether there is an Intestacy, or not. *Richards* v. *Chave* (*a*) is the only Case, in which a Doubt has been expressed upon this Doctrine, that the Power of the Ecclesiastical Court to grant Administration *pendente lite* would not prevent this Court's appointing a Receiver. The Subject has, however, since been very fully examined in *Atkinson* v. *Henshaw* (*b*), certainly under Circumstances much more forcibly calling for the Interference of the Court than these. All the Authorities were on that Occasion cited; and it was strongly urged, that being before Probate, in which Case an Administration *pendente lite* might be had, it was improper to interpose by granting a Receiver: but the *Lord Chancellor* in an elaborate Judgment upon a Review of all the Cases persevered in, and strongly confirmed, the Opinion he had formerly expressed in *King* v. *King* in favour of the Jurisdiction of this Court to interfere by granting a Receiver to protect the Property, while the Suit is depending in the Spiritual Court; though an Administration *pendente lite* might be obtained.

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Under these Circumstances, the Right to Administration disputed, Debts outstanding, and no Measures appearing to be taken for the Management of this valuable Leasehold Property, though Insolvency is denied by the Defendant, stating, that she has expended more than she has [100]

(*a*) 12 *Ves.* 462.

(*b*) *Ante*, the preceding Case.

received,

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received, the mere Power of the Spiritual Court to grant Administration *pendente lite* is not a sufficient Ground for this Court's refusing to act; and upon the Authorities it seems to me proper to continue the Injunction, and grant a Receiver pending the Proceedings in the Ecclesiastical Court.

1813. LINCOLN'S INN HALL, *June* 16.

SMITH *v.* BLOFIELD.

By accepting the Answer the immediate Right to Costs under the Process of Contempt waived.

A SECOND Attachment, issued against the Defendant for want of an Answer, being returned *cepi corpus*, a Messenger was moved for in the last Term; and the Order drawn up; upon which the Messenger procured the *Lord Chancellor*'s Warrant; and was in search of the Defendant; pending which he put in his Answer.

A Motion was made, that it may be referred to the Master, to tax the Plaintiff's Costs, occasioned by the Defendant's Contempt in not putting in his Answer, and of this Application, and the Reference; and that the Defendant may be ordered to pay the Costs taxed.

Mr. *Collinson*, for the Defendant, resisted the Motion, on the Grounds, that the Answer being accepted, the Plaintiff had waived the Costs, except as Costs in the Cause; relying on the late Case (*a*); and contending, that, [101] at all Events, the Costs of the Application ought not to be added to those of the Contempt.

Mr. *Gregg*, in support of the Motion, insisted, that if an Attachment issues for Want of an Answer, the Contempt cannot be cleared without Payment of Costs; distinguishing

(*a*) Anonymous, 15 *Ves.* 174, and see *Boehm* v. *De Tastet, ante,* Vol. I. 324, and the References.

tinguishing the Case cited; as the Plaintiff had replied to the Answer.

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The *Vice-Chancellor*, observing, that the Case cited determined, that the Right to Costs immediately by Process of Contempt was waived by accepting the Answer, refused the Motion with Costs.

1813, *June* 29. *July* 1.

BLISS *v.* BOSCAWEN.

Injunction, refused upon Merits in the Answer, not obtained of course upon amended Bill.

THE Bill prayed an Injunction against proceeding at Law. The Plaintiff upon the Answer moved for an Injunction on the Merits; which, upon Discussion, was refused. He then amended the Bill; and added another Party. All the Defendants, being served with a Subpœna to answer the amended Bill, appeared; and obtained an Order for six Weeks Time to answer; upon which the Plaintiff obtained the common Injunction for staying Proceedings at Law.

A Motion was made to discharge that Order on the Ground, that an Injunction had been refused on the Merits, appearing in the Answer to the original Bill.

Sir *Samuel Romilly*, and Mr. *Hall*, in support of the Motion.

[102]

It has been distinctly decided, that, an Injunction being dissolved on the Answer coming in, the Plaintiff, amending, or filing a supplemental Bill, shall not have a new Injunction unless upon the Merits: *Travers* v. *Stafford* (*a*), *Lady Markham* v. *Dickinson* (*b*), *Edwards* v. *Jenkins* (*c*), and the Anonymous Case before Lord *Hardwicke* (*d*). In the Case of *Nelthorpe* v. *Law* (*e*) the Plaintiff, not having moved for an Injunction upon the original Bill, he

(*a*) 2 *Ves.* 19. *Amb.* 104.
(*b*) 1 *Ves.* jun. 30.
(*c*) 3 *Bro. C. C.* 425.
(*d*) 3 *Atk.* 694.
(*e*) 13 *Ves.* 323.

after

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after Answer amended; and obtained it upon the amended Bill. Can an Injunction, which has been refused upon the Merits, be thus obtained by an Amendment perfectly immaterial, the Alteration, for Instance, of a Letter, or perhaps false in Fact?

Mr. *Hart*, and Mr. *Parker*, for the Plaintiffs, resisted the Motion; relying on *Nelthorpe* v. *Law*, the *Anon. Case in Barnardiston* (a), and *Gilbert* (b).

The Lord CHANCELLOR.

Injunction falls by amending the Bill, unless expressly saved.

If the Plaintiff having obtained an Injunction amends the Bill, the Injunction is gone; unless it is sustained by the Terms of the Order, expressing, that it is to be without Prejudice to the Injunction: then if the Injunction would be gone, unless expressly saved by the Court, it would be extraordinary, if, the Injunction being refused upon the Merits, the Plaintiff shall have it by amending the Bill (1). In the Case of *Nelthorpe* v. *Law* I made that Order with Reluctance: but was bound by the Practice. The Proposition is absurd, that the Court holds a Plaintiff so strictly to the Rule, that he shall put his best
[103] Case forward at first (2), as not to permit him to amend without losing the Injunction, unless expressly saved in that Order of Amendment; yet, if upon discussing the Merits the Court thinks him not entitled to an Injunction, he shall obtain it by amending; not communicating to the Court, why he did not make the Case for it at first. I do not say, you cannot have an Injunction: the only Question is, how you are to apply for it; and, if the Case has all these Peculiarities, it must be by a special Motion, founded upon them; and you cannot take the ordinary Injunction *nisi*.

(a) 13 *Ves.* 322.

(b) *Ib.* 183.

(1) *Travers* v. Lord *Stafford*, *Amb.* 104. Lady *Markham* v. *Dickinson*, 1 *Ves.* jun. 30.

(2) Vide *Sharp* v. *Ashton*, *post*, 3 Vol. 144, and *Norris* v. *Kennedy*, 11 *Ves.* 565.

GIBSON

GIBSON *v.* CLARKE.

1813, *July* 1.

Inquiry at what Time a Title could be made, the Subject of farther Directions after the Report upon the Title; and not to be combined with the Reference of Title.

IN this Case (*a*) an Order had been made, on Motion, for a Reference to the Master to see, whether the Plaintiff can make a good Title to the Estate in Question, according to the Contract between the Plaintiff and Defendant. The Purchaser, who by his Answer insisted, that according to the Abstract delivered, the Vendor was not in a Situation to make a good Title, moved, that to the Minutes should be added an Inquiry as to the Time, when the Vendor could make a Title.

Mr. *Leach*, for the Vendor, contended, that such an Inquiry could not be obtained without a special Case.

Sir *Samuel Romilly*, for the Purchaser, said, it was necessary to settle the Practice in this Respect; such Orders having been frequently made.

The Lord CHANCELLOR.

I believe, we have fallen into Irregularity by departing from what was, I conceive, the old Practice, upon a Decree for specific Performance to direct a Reference to the Master simply to inquire, whether a good Title could be made, or not. When it came back, upon farther Directions the Question of Costs arose; and in that Stage the Time, when a Title could be made, was looked at; and then every one was in Possession of all, that passed in the Master's Office as to the Title; all being Parties to the Proceedings; and that was the Ground of the Reference back to the Master. Lately, since the first Motion (1) for that Purpose, discussed between Sir *James Mansfield* and me, the Reference of Title has been made [104]

(*a*) *Ante*, Vol. I. 500.

(1) *Moss* v. *Matthews*, 3 *Ves.* 279.

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upon Bill and Answer; and it has frequently been prayed, that it should also be referred to the Master to inquire, at what Time it appeared, by the Delivery of an Abstract, that a Title could be made; and in some Instances that has been done by a Sort of Consent: in others it has been omitted: but I conceive, that according to strict Practice this Order ought not to be made, until it is ascertained by a Report, whether there is a good Title, or not, and by every Thing, that passed in the Master's Office, what is the Ground of it. If however the Purchaser does not insist upon the last Term of his Notice, that will not preclude his asking for it, when the Cause comes back upon the Master's Report (1). Where a Reference is made to the Master according to the new Practice, if the Answer states Transactions, as to the Delivery of incompleat Abstracts, Objections taken, farther incomplete Abstracts delivered, &c. and it appears on the Face of the Answer itself, that a Title could not be made at the Time, upon the Point, when the Abstract was delivered, &c. which is merely with reference to Costs, you are always at Liberty to state what passed in the Master's Office upon the Inquiry (2).

(1) *Daly* v. *Osborne*, 1 *Merivale*, 382.

(2) This Case, appearing to have excited some Dissatisfaction (See *Jennings* v. *Hopton*, 1 *Madd.* 211) has been compared with the Register's Book (*A.* 1812, Fo. 1405); by which the Order appears expressly confined to the first Part of the Notice, preserving the Minutes, as they originally stood, for a Reference merely, whether the Vendor can make a good Title: the Purchaser certainly not succeeding in the farther Object of his Notice, an Inquiry, when the Vendor could make a Title; perhaps adopting the *Lord Chancellor*'s Suggestion, by not insisting on it.

The Case was reported, not as a Decision, but to preserve the valuable Observations of the Court upon a Practice wholly modern, and, as it appeared, very little understood.

WILD

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LINCOLN'S INN HALL.
July 16.

WILD *v.* HOBSON.

The Practice at Law, in its general Application confined to Ejectment and the Action for mesne Profits, to stay Proceedings until Payment of the Costs of a former Action between the same Parties, which has been followed in Equity, even where the former Suit was in another Court of Equity, for the same Matter, not applied to a former Suit at Law, an Ejectment by the Heir, and a Suit in the Spiritual Court by some of the next of Kin, disputing, as Paupers, a Will on the Ground of Incapacity; the Plaintiff in Equity being another of the next of Kin.

THE Bill, filed by two of the next of Kin of *Daniel Hobson*, who died in *February*, 1805, prayed an Account, and a Receiver. The Defendant *Edward Hobson* claimed as Administrator, with the Will annexed, dated the 29th of *January*, 1805, devising all the Testator's Property to the Defendant by the Name of *Thomas Hobson*.

A Motion was made by the Defendant *Hobson*, that all farther Proceedings in this Cause may be stayed, until the Plaintiffs shall pay him £495 : 10*s*. remaining due for Costs taxed in an Action of Ejectment, brought in *Trinity* Term, 1812; and until the Costs, incurred by the Defendant *Hobson* in defending the Proceedings, instituted by the Defendant *William Wild* and *Ann Isherwood* in the Ecclesiastical Court, shall be taxed and paid, and until the Plaintiffs shall have given Security for such Costs as may be awarded in this Cause; and, if the Costs at Law and in the Ecclesiastical Court shall not be paid within one Month after delivering the Amount of the Taxation, that the Bill shall be dismissed with Costs.

The Affidavits in support of the Motion stated, that after Probate of the Will the Defendant *William Wild*, one of the next of Kin of the Testator, instituted Proceedings to set it aside in the Ecclesiastical Court; where he was admitted to prosecute *in formâ pauperis*; con-

tending,

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tending, that at the Date of the Will the Testator was insane; that in *January*, 1811, the Court decreed in favour of the Will; observing, that if *William Wild* had not sued *in formâ pauperis*, he would from the gross Nature of the Case have been subjected to Costs; that *William Wild* obtained Leave to appeal; but, being dispaupered, did not prosecute his Appeal; and, the Executors being dead, Administration with the Will annexed was granted to *Edward Hobson*, the Residuary Legatee. That Administration was recalled in consequence of another Suit, by *Ann Isherwood*, another of the next of Kin; which was afterwards dismissed for want of Prosecution. Two Actions of Ejectment, brought by *Thomas Sykes*, the Heir of the Testator, in 1807, were abandoned; and a Bill, filed in 1805 by *William Wild* in the *Exchequer*, to prevent the Transfer of Stock belonging to the Testator, was in 1811 dismissed for want of Prosecution.

In 1808 the Defendant *Hobson* filed a Bill to prove the Will in the Court of *Chancery*; and the Heir and his Wife released; and levied a Fine to confirm it. In *Trinity* Term, 1812, another Ejectment was brought in their Names; in which the Court of *King's Bench* ordered Security for the Costs in case of a Nonsuit, Discontinuance, or a Verdict against the Lessor of Plaintiff. That Cause was tried at *Winchester* in *July* 1812; and a Verdict given for the Defendant *Hobson*; and the Costs were taxed at £1195 : 10*s*.

Mr. *Leach*, and Mr. *Heald*, in support of the Motion.

This Application stands upon a Principle in the Administration of Justice, common to all Courts; that a Party shall not be harrassed by a second Litigation upon the same Subject of Property, by the same Party, who had failed

failed in a previous Litigation, until the Costs of that former Attempt have been paid: *Pickett* v. *Loggon* (*a*). That the Suits should be in the same Court is not required. The Principle is the double Vexation; which applies equally to two Proceedings by the same Party upon the same Subject, whether in the same Court or different Courts. Thus after the Failure of an Ejectment in the Court of *King's Bench* another Ejectment in the Court of *Common Pleas* must be subject to the Application of this Principle: *Melchart* v. *Halsey* (*b*). If the former Suits were instituted for the Benefit of these Plaintiffs, if they are substantially the Claimants, the Court will not permit this Right of the Defendant to be baffled by Agreement or Contrivance.

Sir *Samuel Romilly*, Mr. *Fonblanque*, Mr. *Hart*, and Mr. *Smith*, for the Plaintiffs.

There is no Instance of such an Application granted under similar Circumstances. The Principle relied on has been at Law confined to the Action of Ejectment; entirely a Creature of the Courts at Law; and there is but one Authority of Costs directed to be paid by the Plaintiff upon an Ejectment not brought by himself: but it was by his Father. Only two Instances are to be found of applying in this Court that Rule of Law as to Actions of Ejectment: *Pickett* v. *Loggon* (*c*); a Case of two Suits in this Court; and another (*d*), of Proceedings in this Court stayed, until the Costs of a Suit in the Court of *Exchequer* were paid: but both Bills were, as in *Pickett* v. *Loggon*, for precisely the same Purpose. This Suit is not upon the Face of it for the same Purpose, and

(*a*) 5 *Ves.* 702.
(*b*) 3 *Wils.* 149.
(*c*) 5 *Ves.* 702.
(*d*) *Holbrooke* v. *Cracraft*, 5 *Ves.* 706, Note (*b*).

instituted

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instituted by the same Party, as the others. Will the Court go into a long Discussion upon Affidavits, that it is so substantially? The Suit in the Spiritual Court was instituted by a Plaintiff, suing *in formâ pauperis;* and Costs being on that Account not given, this Court is in a Suit instituted by another Person desired to reverse that Decision, and give Costs; to assume, that the Ecclesiastical Court had before it the same Question, the same Evidence, and Means of determining upon the Rights of the Parties. How can it be presumed, that the Spiritual Court tried the Rights, put in Issue in this Cause; involving distinct Claims, one as Heir at Law, the other as personal Representative? The only Subject of Suit in that Court was the Right to Administration under the Will of 1805.

The Lord CHANCELLOR.

This Application appears to me to be of very great Importance; and in my Experience was never before granted; and I am anxious to state the Reasons, upon which, though perhaps in this Case it might be morally right, with reference to Principle and general Mischief I dare not venture to grant it. On the other Hand, though pressed to dismiss this Motion with Costs, under the Circumstances I shall not do that.

Upon looking into the History of Courts of Law with reference to Applications to stay pending Proceedings, until the Costs of former Proceedings have been discharged, not dismissing the second Action, but merely staying it until Justice shall be done to the Defendant in the former Action, by paying those Costs, which the Law has imposed on the Plaintiff, it appears to have been originally very much confined to the Action of Ejectment; and it may be laid down generally, that in an Action, so much a Creature of their own Formation, it is not unfair,

as

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as a general Rule, that the second Action should be stayed, if the Costs of the former are not paid: not universally; as in many Instances, though the same Question, that arose in the second Cause, must be capable of being tried in the first, it might not be the Fault of the Party, that he did not bring it on. This was afterwards extended to the Action for *mesne* Profits: but so lately as the Time of Lord Chief Justice *De Grey* (a) there was considerable Doubt, whether a Court of Law would apply that Principle, represented as one of general Application both at Law and in Equity, to any other Action than those two. The Opinion of the Court, as it is expressed, seems to extend to Actions quite of a different Nature, upon Contract: but they very cautiously went no farther than staying the Proceedings, expressly on the Ground, that they were satisfied, that the second Action was vexatious; and *Blackstone*, Justice, having expressed his Opinion, that in all Cases, where the Merits have been tried, the Plaintiffs should not be permitted to commence a second Action to try the same Matter before Costs paid in the first, draws back a little, influenced, I suppose, by the Caution of the other Judges; and also puts the Decision upon the Vexation in that Instance.

In an Action on the Case Proceedings stayed until Payment of the Costs of a former Action between the same Parties, in another Court, upon the Ground of Vexation.

That Case is also an Authority in another Respect for this Application; that one Court will in certain Proceedings stay a second Action, though the first was in another Court. In that Instance it was in the Court of *King's Bench*: but it was a Case of very simple Circumstances. I admit also, that there may be Cases, in which a Court of Equity will stay Proceedings in a Suit, which is for the very same Matter as another Suit in another Court of Equity: but the Difficulty I have is, whether that Principle, upon which a Court of Equity will interfere for

(a) *Melchart* v. *Halsey*, 3 *Wils.* 149.

this

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this Purpose, admits Application, where one Suit is in Equity, and the other at Law; and I doubt that. Even the Diligence, which has been exerted on this Occasion, has produced but one Instance. In one of the two Cases, that were cited, the first Suit was in the Court of *Exchequer:* but there was no Contest here, whether both Suits were not for the same Matter. Suppose a Plea put in of another Suit depending for the same Matter: upon that Plea, the Court having found it impossible to examine its Truth, there must be a Reference to the Master to ascertain, whether the Suits are for the same Matter (*a*). If the Defendant will not plead, but consents, the Plaintiff giving Security for the Costs incurred, that the second Suit shall proceed, I do not say, the Court would not permit that, where both Suits are in Equity: but, if upon the Allegation, that they are for the same Matter, Security for Costs is required, I ought to take the same Course; ascertaining by the Master's Judgment upon a Reference, whether these Suits are for the same Matter; or whether this Bill opens to different Relief from that, which could have been had in the Ecclesiastical Court, or upon the Ejectment. No Instance has yet been produced of an Application to stay Proceedings, until Costs paid, or upon any other Terms, when the first Proceeding was at Law, or in the Ecclesiastical Court upon such a Subject as this, and the second in a Court of Equity. In the Case of a Devise of real Estate upon a Bill filed after the Trial of an Ejectment was such an Interposition of this Court ever heard of on the Ground, that the Party had not first filed a Bill in Equity, where the Medium of Proof is perfectly different (*b*), that therefore he should pay the Costs of the Ejectment? That is a Case occurring

Plea of another Suit for the same Matter referred to the Master.

Distinction of legal and equitable Jurisdictions upon the same Subject, with reference to the different Modes of Proof.

(*a*) Ord. in *Chanc. p.* 120. Ch. Pl. 198. Ed. 1698. (1) *Urlin* v. *Hudson*, 1 *Vern.* 332. *Redesd.* Tr.

(*b*) See *Evans* v. *Bicknell*, 6 *Ves.* 174.

(1) Ord. *Ch.* (*Ed. Beam.*) 176, 177.

every

every Day: yet no one remembers an Instance of such an Application. One Difficulty is, that, admitting the Trial to be of the same Matter, it is not in the same Mode. Suppose the Defendant to admit the Truth of the Bill, may not the Plaintiff be relieved: or is the Answer sufficient, that, having tried the Question at Law, he shall not apply to the Defendant's Conscience: the Principle, as applied to two Suits in Equity, or to one in Equity and one at Law, being perfectly different?

Another View of the Case obliges me to dismiss this Application. A Plea could not possibly be put in; as the Matter in the Ecclesiastical Court could not be the same Issue in Fact, as that upon this Record; and, though that might be brought into Contest in the Ejectment, still this Question recurs, whether, that Ejectment having been tried without addressing the Conscience of the Defendant, they are not to be at Liberty now to take that Course, until they have paid the Costs of that Proceeding; in which the Defendant had Security given to him of his own Valuation in the Court, where that Proceeding passed. As to the Ecclesiastical Court I looked at the Proceedings, to ascertain, whether the main Point in Issue in this Cause was tried there: if it had been, that would not be conclusive: but it was not: the only Point in Issue there being the Sanity of the Testator. If he was sane, he might have been imposed upon with reference to the Bequest of the Residue; or for other Reasons, that may be supposed, the Bequest would not operate; and in both Cases, especially the latter, the whole of the Will would have been proved in the Spiritual Court. Suppose the Objection to be, not to the Sanity of the Testator, but to the Description of the residuary Legatee, as a Person not existing at the Death of the Testator; and therefore the Bequest lapsed. The Question might certainly have been tried in the Ejectment at *Winchester*, if they could have

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shewn, that some other Person was residuary Devisee: but that brings it again to the short Point I mentioned, whether the Court is to stay Proceedings, until the Costs at Law are paid, because the Plaintiff comes into Equity to ask the Defendant upon his Oath, what he knows upon the Subject; unless I am to lay down, what never was asserted, that a Plaintiff must not bring an Ejectment, until he has filed a Bill. As to the Costs of the Ejectment there is this short Ground. The Court of Law gave the Defendant Security for Costs according to his own Measure; and did not impose the Term, that a Bill should not be filed. If the Security taken was somewhat too scanty, upon what Ground as I to interfere, because that Proceeding was taken before the Bill filed?

Proceedings stayed until Payment of Costs of a former Suit by the same Party *in formâ pauperis* only upon great Vexation.

As to the other Proceeding, it is very delicate for this Court upon the Ground of Vexation to say, a Party should have the Costs of a Proceeding in the Ecclesiastical Court, where the Suitor was admitted *in formâ pauperis*, when we recollect, with what Caution such Persons are ever required to pay Costs. Where a Person, who in a former Proceeding sued *in formâ pauperis*, has instituted a second Suit for the same Purpose, not being dispaupered, in the former, there is no Instance, that the Court ever stayed the second Proceeding, until he paid those Costs, not due by a former Judgment, but to become due by Taxation; unless the new Proceeding was to be justly characterized as very vexatious. In such Cases that has been done (*a*).

Agreements for Contribution to the Expence of Litigation without a common Interest, though not favoured, not treated harshly.

This Deed was very improper certainly; but the Animadversion upon Agreements relative to the Expences of

(*a*) See *Corbett* v. *Corbett*, 16 *Ves.* 407.

Suits,

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Suits, must not be too harsh; as, if this is not permitted, in many Cases the poor Man will not get that, to which he is entitled, and the rich Man will withhold what he ought to give up. In this Instance however there was a common Interest in the Subject; and the Ground, upon which I refuse this Motion, will do, even if there was the same Plaintiff in the three Proceedings. In that View the Combination complained of does not affect me. The Ground, on which I refuse this Motion, is, that I cannot apply to a particular Case a Principle, the general Application of which would produce enormous Mischief: but I shall give no Costs; though this Application has considerable Novelty; as there has been much in Controversy, which could not be urged effectually here; as it might have been elsewhere; where it has not produced any Effect.

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THE EARL OF CHOLMONDELEY v. LORD CLINTON.

After Answer Motion to amend the Bill by striking out the Relief refused.

THE Defendants to a Bill, praying Discovery and Relief, having put in their Answer, and obtained an Order for the Plaintiff to elect to proceed at Law or in Equity, the Plaintiff served them with Notice, that he should elect to proceed at Law; and moved that he may be at liberty to dismiss, his Bill so far as it seeks Relief, and to amend the Record by striking out so much as seeks Relief.

Mr. *Roupell*, in support of the Motion, mentioned *Gurish* v. *Donovan* (*a*); observing, that no Inconvenience

(*a*) 2 *Atk.* 166.

 could

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could arise to the Defendant from retaining the Bill, as a mere Bill of Discovery; and it would prevent the Delay and Expence of filing another Bill for Discovery merely, offering to pay the Costs.

Mr. *Heald*, for the Defendants, resisted the Motion, as contrary to the Practice; distinguishing *Gurish* v. *Donovan*; as from the Register's Book, it appears, that the Answer was put in after the Order (*a*).

The

(*a*) *Gurish* v. *Donovan*, 9th *July*, 1739. Reg. Lib. A. 1738, Fo. 462. Order for a *Ne Exeat Regno*.

31st *July*, 1739. Reg. Lib. A. 1738, Fo. 481. Order to discharge the *Ne Exeat Regno* upon the Answer.

23d *August*, 1739. Reg. Lib. A. 1738, Fo. 541. Order to amend the Bill upon Payment of 20*s*. Costs.

25th *October*, 1739. Reg. Lib. A. 1739, Fo. 55. Order for the Plaintiffs to make their Election, whether they would proceed in this Court or at Law.

15th *Nov.* 1739. Reg. Lib. A. 1739, Fo. 17. Reciting the Order of the 25th of *October*, for the Plaintiffs to make their Election, that the Plaintiffs in pursuance of the said Order by their Election, made the 31st of *October*, did elect to proceed at Law for all the Matters which were sought by the original Bill, and to proceed in this Court for a Discovery only; and that the Defendant this Day moved, that the said Election might be discharged; it is by Consent ordered, that the Plaintiffs do amend their said Bill by striking out any Prayer therein for Relief.

18th *Dec.* 1740. Reg. Lib. A. 1740, Fo 108; Stating, that the Plaintiffs, having exhibited their Bill in this Court against the Defendant for an Account of the Voyage of a Ship, of which the Defendant was Supercargo, and pretending, that the Defendant had secreted to his own Use Gold Dust and Moidores to a great Value, obtained a Writ of *Ne Exeat* against the Defendant in the Sum of £1600; and took him into Custody thereon; and, the Defendant having put in his Answer on the 31st Day of *July*, 1739,

the

1813. The Earl of CHOLMONDELEY v. Lord CLINTON.

The Lord CHANCELLOR, admitting that Distinction, said it was difficult at this Day to apply Lord *Hardwicke's* Doctrine as to Bills of Relief and Discovery; Lord *Thurlow* having in a great Measure over-ruled it (*a*); and the better Way for the Plaintiff was to dismiss his Bill and file a new Bill for Discovery merely.

The Motion was therefore refused (*b*).

the said Writ was discharged; after which the Plaintiffs brought their Action at Law against the Defendant for the same Matters; and thereupon the Defendant obtained an Order for the Plaintiffs to make their Election; after which the Plaintiffs filed a special Election, viz. to proceed at Law for the Relief sought by their Bill, and in this Court for a Discovery only; and, the Plaintiffs having amended their Bill pursuant to an Order for that Purpose, and thereby prayed Relief, the Defendant thereupon moved to discharge the Plaintiff's Election; and on the 15th *November*, 1739, it was by Consent ordered, that the Plaintiffs should amend their Bill by striking out any Prayer for Relief; and the Bill was amended accordingly; and the Defendant afterwards put in his Answer thereto; and the Plaintiffs, having had a full Discovery thereof, proceeded on their Election at Law; and obtained Judgment against the Defendant therein, and took out Execution thereon; and charged the Defendant in Custody of the Sheriff of *Middlesex*; and he is now a Prisoner in the *Fleet* upon such Execution; and therefore it was prayed, that the Plaintiffs may pay unto the said Defendant his Costs of this Suit, to be taxed by the Master; which was ordered accordingly; and it was referred to the Master to tax the said Costs.

(*a*) See *Baker* v. *Mellish*, 10 *Ves.* 544, and the Note (*a*) 553. *Gordon* v. *Simkinson*, 11 *Ves.* 509.

(*b*) After Answer to a Bill of Discovery Motion to amend by adding a Prayer for Relief refused with Costs. *Butterworth* v. *Bailey*, 15 *Ves.* 358.

1818,
LINCOLN'S
INN HALL.
July 23, 27.

Commission to examine Witnesses abroad granted to a Defendant, who had cross-examined, but not examined in chief under a Commission sued out by the Plaintiff.

SHEWARD *v.* SHEWARD.

RALPH *Sheward* by his Will gave an Estate to Trustees, to the Use of his Daughter *Elizabeth Rickards* and her Husband *Samuel Rickards* for their Lives; with Remainder to the Use of his Son *George Sheward* and his Assigns for Life: Remainder to the Use of all the Children and Grand-children of his said Son living at his Decease, as Tenants in Common.

George Sheward died in the Life-time of *Samuel Rickards*, the Tenant for Life; and the Bill, filed by the Children of *George Sheward* by his second Marriage, against *Ann Sheward*, his only Child by a former Marriage, in 1791, prayed, that the Plaintiffs may be at liberty to examine Witnesses to prove the Marriage of the Defendant's Mother with a Man, who was living at the Celebration of the Marriage between her and *George Sheward*; and that the Testimony of such Witnesses may be perpetuated.

A Commission having been sued out by the Plaintiffs to examine their Witnesses, under which the Defendant cross-examined, but did not examine any Witnesses in chief, a Motion was made on the Part of the Defendant for a Commission for the Examination of Witnesses at *Philadelphia*, in *America*.

Mr. *Whitmarsh*, in support of the Motion.

Mr. *Treslove*, for the Plaintiffs, resisted the Motion; contending, that, if the Defendant wished to examine

Witnesses,

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Witnesses, she must file a Bill for that Purpose; and was not entitled to a Commission under the Bill, filed by the Plaintiffs.

The Lord CHANCELLOR thought, that the Defendant was entitled to examine Witnesses in chief under the Plaintiff's Commission; and was therefore entitled to a Commission to examine her Witnesses abroad.

July 27.

The Order was made (*a*).

(*a*) *Ex Relatione*, Mr. *Whitmarsh*.

1813, *July* 27.

ROBINSON *v.* THOMPSON.

Demurrer over-ruled: as covering Relief, to which the Plaintiff was entitled; and not distinctly pointing out, what Parts of the Bill were demurred to, and what answered: viz. demurring to all the Discovery, except "touching" the several Title Deeds, creating the Intail, &c.; and "as to the "Residue of "the said Bill "not demurred "to" answer-

THE Bill stated a Settlement in the Year 1730, under which by the Deaths of preceding Tenants in Tail, *George Robinson* became, in the Year 1762, seised of an Estate in Tail Male in the County of *Lancaster;* that *Williamson* and his Wife, the Widow of the last Tenant in Tail, being in Possession, had procured from *George Robinson*, an illiterate Man, and intoxicated through their Practice, a Deed of Grant during *Robinson*'s Life: and had collusively sold the Estates to the other Defendants; some of whom were in Possession of the Title Deeds. The Plaintiff, as the eldest Son of *George Robinson*, (deceased), by his Bill prayed a Discovery of the Title Deeds; that the Deed, executed by *George Robinson*, may be declared fraudulent, &c.: that the Defendants may be decreed to deliver Possession of the Estates, and of the Deeds; that the Plaintiff may be at liberty to sue out such Writs as he may be advised; and for an Account.

To this Bill the Defendant *Thompson* put in the following Demurrer and Answer: "As to all the Relief "prayed by the said Bill and all the Discovery sought "thereby from this Defendant, except so far as the said "Bill seeks a Discovery from him touching the several "Title Deeds or Instruments whereby the Intails in the "said Bill mentioned are respectively alledged to have "been created and the Proceedings and Award therein "mentioned, and except so far as the said Bill also seeks "a Discovery from this Defendant whether this Defendant "hath not and by what Means and when and from whom "procured or got into his Possession or Power the Will "of *Robert Robinson* in the said Bill named or a Coun-

"terpart

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ROBINSON v. THOMPSON.

"terpart thereof executed and attested as in the said Bill "is mentioned or a Probate or other Copy thereof, and "whether this Defendant now hath or when last had the "same or in whose Possession now is the same or what "is become thereof, this Defendant doth demur;" &c. "And as to the Residue of the said Bill not demurred to "as aforesaid and hereinbefore set forth this Defendant" proceeded to answer to the Parts specified.

Sir *Samuel Romilly*, and Mr. *Horne*, in support of the Demurrer.

This is a mere legal Title; for which the Plaintiff does not want the Assistance of this Court. The Deed, which the Bill seeks to set aside, is a mere Grant for the Life of a Person who is dead; and, if, as Tenant in Tail, the Plaintiff is entitled to the Production of Deeds, he has not annexed to his Bill the Affidavit, without which he cannot have that Production (*a*).

Mr. *Wear*, Mr. *Bell*, and Mr. *Gardiner*, for the Plaintiff.

This Demurrer and Answer is defective, as not stating precisely the Points, to which the Demurrer goes: *Devonshire* v. *Newenham* (*b*). The general Reference to "the Residue" of the Bill is too loose; and so is the Expression "touching" the several Title Deeds, &c. It cannot be known, whether the Parts answered are sufficiently answered, until the Demurrer is disposed of. Admitting the Deed to have disposed of only an Estate for Life, if that Deed was fraudulent, the Plaintiff is entitled to an Account of the Rents and Profits. An Affidavit is

(*a*) Ld. Red. Tr. Ch. Pl. 112. (*b*) 2 *Sch.* and *Le. Fr.* 199.

 not

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not necessary in this Case: *Whitchurch* v. *Golding* (*a*): *The Anonymous Case in Atkyns* (*b*): *Dormer* v. *Fortescue* (*c*): and *Renison* v. *Ashley* (*d*).

Sir *Samuel Romilly*, in reply.

The Plaintiff's Title, if any, is at Law. The Authorities cited admit the Necessity of an Affidavit in the Case of a Bill praying Relief such as this. The Objection, that it cannot be known, before the Demurrer is disposed of, whether Exceptions would hold to the Answer, or not, occurs in every Instance of a Demurrer and Answer. The Objection taken in *Devonsher* v. *Newenham* (*e*) by Lord *Redesdale*, has no Application to this Pleading; which points out particularly the Parts, to which the Defendant answers; removing all Difficulty in taking Exceptions, if those Parts are not answered. The Term "touching" is merely synonymous with "relating to."

The VICE-CHANCELLOR.

The Defendant, under an Order not to demur alone, having put in a Demurrer and Answer, the Demurrer, going to the whole Relief prayed, has by answering to that, which is connected with the Relief, gone too far; and, as to the Account prayed of the Rents and Profits during *George Robinson*'s Life, the Deed being fraudulent, the Plaintiff has a Right to come here, to have that Deed set aside, and the Account taken. In that Respect also the Defendant, demurring to the whole Relief, has gone too far. With regard to the Form, it is contended, that the Demurrer is bad, as not specifying dis-

(*a*) 2 *P. Wms.* 540.
(*b*) 3 *Atk.* 17.
(*c*) 3 *Atk.* 132. See also Ld. *Red.* Tr. Ch. Pl. 113.
(*d*) 2 *Ves.* jun. 459.
(*e*) 2 *Sch.* and *Lef.* 199

tinctly

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tinctly that, which is demurred to, and that, to which the Defendant answers; obliging the Court, in order to determine the Extent of the Demurrer, and ascertain what is comprised under this vague Expression "the Residue of "the said Bill;" to go through the whole Record, involving a long Title, as to all "touching" which the Defendant professes to answer; and laying the Master under the same Difficulty upon Exceptions. A Mode of pleading so loose is bad on all the Authorities; and this Case strongly illustrates the Rule, stated by Lord *Redesdale* (*a*), on which his Lordship acted in the Case of *Devonsher* v. *Newenham* (*b*), that the Demurrer, if it does not go to the whole Bill, must clearly express the particular Parts demurred to. That Case is a direct Authority for this. Therefore on both Grounds, that the Demurrer covers Part of the Relief, to which the Plaintiff will be entitled, and upon the Objection of Form, the Demurrer must be over-ruled (*c*).

(*a*) Tr. Ch. Pl. 173.

(*b*) 2 *Sch.* and *Lef.* 199.

(*c*) *Wetherhead* v. *Blackburn:* the following Case. It seems that a Demurrer to the whole Bill, with an Exception to a small Part, may be good in point of Form. *Hicks* v *Raincock*, 1 *Cox.* 40.

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Demurrer, not stating particularly the Parts demurred to, but generally, to the whole Bill, with an Exception of immaterial Facts, which were answered, after the usual Order for Time, over-ruled.

THE Bill prayed a Discovery; that the Defendant may be declared a Trustee for the Plaintiff as to the legal Interest in a Ship, called the *Greyhound;* and may be decreed to execute a Bill of Sale or Assignment of the Ship to the Plaintiff.

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The Defendant put in a Demurrer and Answer: the Demurrer extending to the whole of the Bill, "Except "only as to such Part and so much thereof as requires "this Defendant to set forth whether the Ship or Vessel "called the *Greyhound* did not trade from the Port of "*London* and from thence back to *Ramsgate* or from and "to some and what Place or Places, Port or Ports or "how otherwise; and whether Defendant doth not set "Plaintiff at defiance;" and for Cause of Demurrer shewing, that the Bill doth not contain any Matter of Equity, whereon this Court can ground any Decree, or give the Plaintiff any Relief, &c.; "And as to so much and such "Parts of Plaintiff's said Bill as requires Defendant to "answer and set forth, whether the Ship did not trade," &c. admitting, that she did trade from and between *London* and *Ramsgate*; and that he did set the Plaintiff at defiance.

Mr. *Hart*, and Mr. *Phillimore*, in support of the Demurrer, referred to *Tomkin* v. *Lethbridge* (*a*), *Thomas* v. *Lethbridge* (*b*), and *Nabos* v. *Plura* (*c*); contending that the Objection to an immaterial Fact, as an Evasion of the Order for Time, had not been extended beyond the Denial of Combination; and that this Form of Demurrer corresponded with the Precedents; and is most convenient from the Length, to which a more particular Statement of the Parts demurred to would lead.

Sir *Samuel Romilly*, and Mr. *Wear*, for the Plaintiff, insisted, that the Allegations of the Vessel's trading from *London* to *Ramsgate*, and that the Defendant did set the Plaintiff at defiance, being as immaterial as the Denial of Combination, could not be considered as a Compliance

(*a*) 9 *Ves.* 178.

(*b*) 9 *Ves.* 463. *Lansdown* v. *Elderton*, 8 *Ves.* 526. *Smith* v. *Serle*, 14 *Ves.* 415. See also 11 *Ves.* 73.

(*c*) In the Court of *Exchequer*, MSS.

with

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with the Order: *Stephenton* v. *Gardiner* (*a*). The Demurrer therefore must either, according to *Taylor* v. *Milner* (*b*), be taken off the File, or over-ruled; that the other Objection, that he has not specified the particular Parts, is equally fatal. The Interrogatories, to which the Demurrer is pointed, should be particularly stated; and a general Demurrer, with an Exception, is bad on all the Authorities; *Chetwynd* v. *Lindon* (*c*), Lord *Redesd.* Tr. (*d*), Ord. in Ch. (*e*).

The VICE-CHANCELLOR.

Mere Denial of Combination not a Compliance with the Terms of the Order for Time, not demurring alone.

It has been determined, that the mere Denial of Combination does not comply with the Terms of the Order, by which a Defendant, obtaining Time, comes under the Obligation not to demur alone: but this Defendant, under the Difficulty, that by answering to a material Part of the Bill he must over-rule his Demurrer, has proceeded by Answer to state a Fact, shewing, that this Ship is British, and an Object of the Registry Acts (*f*); admitting farther, that he sets the Plaintiff at defiance: a Fact, not otherwise material than as shewing, that the Plaintiff is compelled to come here. These Facts are connected with the rest of the Bill; and cannot be separated, so that the Defendant can say, he has not answered to that, which is covered by his Demurrer; and this Mode of pleading, by a Demurrer, generally, to the whole Bill, with an Exception, instead of demurring directly to so much of the Bill as calls on the Defendant to set forth, &c. imposes

(*a*) 2 *P. Wms.* 286. See *Lee* v. *Pascoe*, 1 *Bro.* C. C. 78. Ld. *Red.* Tr. Ch. Pl. 170.

(*b*) 10 *Ves.* 444.

(*c*) 2 *Ves.* 451.

(*d*) Tr. Ch. Pl. 173.

(*e*) Ord. in Ch. 97. *Cart.* Rep. 113. *Devonsher* v. *Newenham*, 2 *Sch.* and *Lef.* 199, and *Robinson* v. *Thompson*, *ante*, the preceding Case.

(*f*) Stat. 26 *Geo.* 3. c. 60, and 34 *Geo.* 3. c. 68.

upon

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Demurrer, not going to the whole Bill, must clearly express the particular Parts demurred to.

upon the Court the Necessity of comparing the Demurrer and Answer with the whole of the Bill: the Rule, as expressed by Lord *Redesdale* (a), being, that a Demurrer, if it does not go to the whole Bill, must clearly express the particular Parts demurred to. The farther Questions are, whether the Defendant, professing to select something as immaterial as the Denial of Combination, satisfies the Order, requiring him not to demur alone: or, if what is so selected is material in some Degree, as connected with, and bearing upon, the main Subject of Relief, (as in the Case in the Court of *Exchequer*, the Fact, that the Party was employed as an Auctioneer), whether the Answer in that Respect does not over-rule the Demurrer.

July 27.

The VICE-CHANCELLOR, considering the Answer as immaterial, and that upon the Objection of Form this Case fell within the Principle of *Robinson* v. *Thompson* (b), over-ruled the Demurrer.

(a) Lord *Redesd.* Tr. Ch. Pl. 173.

(b) *Ante*, the preceding Case.

1813, *July* 28. LINCOLN'S INN HALL,

Ex parte NORTHAM.

Bankrupt permitted to petition against the Commission *in formâ pauperis.*

THE Petition, stating, that the Petitioner, a Bankrupt, having presented a Petition, impeaching the Debt, on which the Commission issued, which Petition he was from Poverty unable to prosecute, prayed, that he may be permitted to proceed *in formâ pauperis*; and that Counsel and a Solicitor may be assigned him.

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The Petition was accompanied by a Certificate of Counsel, that the Petitioner had just Cause to be relieved, and an Affidavit that he is not worth £5.

Sir *Samuel Romilly*, in support of the Petition.

The *Lord* CHANCELLOR made the Order, as prayed (1).

1813. LINCOLN'S INN HA[LL]. *July* 3[0].

HALL *v.* JENKINSON.

Receiver appointed after Answer of a Purchaser, upon the mutual Lien, for the Remainder of the Purchase-money, or the Deposit, a mixed Possession, his admitted Insolvency, and Intention to sell and convey.

THE Bill prayed the specific Performance of a Contract by the Defendant to purchase an Estate from the Plaintiff; as the Result of several Letters, that passed between them. Upon the Allegation, that the Defendant had taken Possession, the Answer admitted, that he sent Sheep upon the Lands: and requested the Plaintiff, whose Servants and Shepherd continued on the Premises, to get the Hay made; and denied, that the Defendant's Bailiff had the sole Management of the Estate, or that the compleat and absolute Possession was ever given up to him, as the Agent of the Defendant; the Plaintiff having left his Shepherd with a great Number of Sheep and Cattle upon the Estate; which continued there for a considerable Time; and the Shepherd still continues to reside there, contrary to the Wishes of the Defendant; and has during such Residence cut Fire-wood, and performed other Acts of Ownership, as the Agent of the Plaintiff. The Answer admitted, that the Defendant was embarrassed; that his Goods had been taken in Execution; and, to extricate himself from his Difficulties, he had put up the Estate in *November* last for Sale by Auction; but no Bidders appeared.

(1) The same Order was made in *Ex parte George Dunman*, 14 *May*, 1814, at *Lincoln's Inn Hall*, by Lord *Eldon*, C.

A Motion

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A Motion was made by the Plaintiff for a Receiver; upon the Affidavit, that since the Bill filed he had discovered, that the Defendant was insolvent: and that all his real and personal Estates, including the Estate, which was the Subject of the Contract, were to be conveyed and assigned to Trustees for the Benefit of his Creditors.

Sir *Samuel Romilly*, and Mr. *Wingfield*, in support of the Motion.

Mr. *Hart*, for the Defendant.

The Lord CHANCELLOR.

Under the peculiar Circumstances of this Case a Receiver ought to be appointed. From the long Correspondence, that passed between the Parties, they seem to have dealt with more Liberality than occurs in the Caution usually observed between Vendor and Vendee. The Purchaser, having given his Bill of Exchange for the Deposit, which, though not paid when it became due, was taken up some Time afterwards, was let into Possession; not exclusively, but it was a Sort of mixed Possession; the greater Proportion of it being in the Vendee: but the Vendor not being entirely out of Possession. On these Grounds, therefore, that, if the Contract can be carried into Execution, the Vendor has a Lien on the Estate for the Remainder of the Purchase-money, that, if it cannot be executed, the Purchaser has a Lien to the Extent of the Money paid by him on account of his Purchase, that the Purchaser is insolvent, that by attempting to sell and convey the Estate the Title would be embarrassed, and lastly, that the Possession has never been a clear and exclusive Possession of the Purchaser, but a mixed Possession of both, under these Circumstances I am of Opinion, that a Receiver ought to be appointed.

BRODIE

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BRODIE *v.* BARRY.

Heir at Law of heritable Property in *Scotland*, being a Legatee of personal Property in *England*, put to Election.

Being a married Woman, the Interest of her Husband by his marital Right not affected.

ALEXANDER Brodie by his Will, dated the 9th of *August*, 1810, duly attested for devising Freehold Estates, devised and bequeathed to Trustees, their Heirs, Executors, &c. all his Freehold, Leasehold, Copyhold, and other, Estates, whatever and wheresoever situate in *England*, *Scotland*, and elsewhere, and all his personal Estate whatsoever and wheresoever, upon Trust to carry on his Works for three Years; and out of the Produce, Dividends, and Interest, as well as the Rents of his Estates, in the first Place to pay Salaries to the Managers of his Works, and the Surplus to divide equally among his Nephews and Nieces, who should be living at the Time of his Decease, Share and Share alike; and at the Expiration of the said Term of three Years, to sell and dispose of all his Freehold and Copyhold Messuages, &c.; and the Money to arise from such Sale to form a distributable Fund, and be payable, as after mentioned in any Codicil: and as to all the Residue of his Estate, not consisting in Money, upon Trust to consolidate it into one gross Sum; and subject to, and in default of, Appointment, to pay it equally among all his Nephews and Nieces, Share and Share alike: as to the Shares of three Nieces, being married, for their separate Use for Life; with Remainder to their respective Children; and for want of Children to sink into the Residue.

The Testator died on the 6th of *January*, 1811, without Issue; not having made any Appointment; and leaving the Defendant *Charles Brodie*, his Grand-nephew, Heir at Law and customary Heir by the Law of *England*, and the Defendant *Betty Cock*, one of his married Nieces mentioned

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mentioned in the Will, Heiress by the Law of *Scotland* of all his heritable Property in that Country. The Bill was filed by his other surviving Nephews and Nieces; submitting, that, though the Testator intended to dispose of all his real Estate in *Scotland*, and all such his Estate there as by the Law of that Country descends to the Heir, comprised under the Description of heritable Property, yet the Will not being conformable to the Solemnities required by the Law of *Scotland*, and therefore not passing such real Estate and heritable Property, the Defendant *Betty Cock* ought not to be permitted to take such heritable Property in Opposition to the Will, and also a Share of the other real and personal Estate, as one of the Nieces of the Testator; but ought to be put to her Election; and praying, that she may be decreed to elect accordingly.

The Answers submitted, whether the Defendants *Brodie* and *Cock* ought to be put to their Election; and as to the Defendant *David Cock*, taking no Interest under the Will, the Property being given to the separate Use of his Wife, whether he could be called upon to make such Election as to the Estate for Life, to which he is entitled by the Law of *Scotland* in the heritable Property, descending in his Wife.

(*a*) Sir *Samuel Romilly*, and Mr. *Clayson*, for the Plaintiffs, admitted, that the Interest of the Husband under his marital Right could not be affected; and, referring upon the general Law of Election to *Carey* v. *Askew* (*b*), *Pettiward* v. *Prescott* (*c*), and *Woodford* v. *Thellusson* (*d*), distinguished this from the Case of a Devise in *England*, void by the Statute of Frauds (*e*): the *Scotch* Estate being,

(*a*) The Arguments *Ex Relatione*.

(*b*) Stated 8 *Ves*. 492, in *Sheddon* v. *Goodrich*.

(*c*) 7 *Ves*. 541.

(*d*) 13 *Ves*. 209.

(*e*) Stat. 29 *Ch*. 2, c. 3.

being, not devisable, but capable of Conveyance by Deed alone; in that Respect resembling a Copyhold; which, if not surrendered, would raise a Case of Election against the customary Heir; citing the Case of the Duke of *Roxburgh;* in which Lady *Kerr* disputed Part of the Will upon the Law of Death-bed: *Erskine's* Institute (*a*), and *Cunningham* v. *Gayner;* that the Heir cannot claim his Share of the Personalty without bringing the Estate into Hotchpot.

Mr. *Leach*, and Mr. *Cooke*, for the Defendants.

This Question depends upon the Principle of *English* Law; if that is applicable to the *Scotch* Heir. The Testator gives upon such Conditions as he thinks proper; and the Heir, if he accepts the Gift, must take subject to the Conditions: but if there is no Condition expressed, the Question arises upon the Effect of the Instrument; whether it gives the Estate from the Heir; and, if the Instrument, not following the proper Form of Law, has not the Effect of perfect Gift, it cannot be regarded as indicating the Intention. The Distinction between Copyhold and Freehold Estate in this Respect has been frequently doubted: the Will being competent to indicate the Intention as to the former, if the Devisor has by a previous Surrender acquired the Power of Disposition: but this Instrument cannot be taken as indicating any Intention against the *Scotch* Heir.

The MASTER *of the* ROLLS.

If it were now necessary to discuss the Principles, upon which the Doctrine of Election depends, it might be dif-

(*a*) *Ersk.* Inst. 694, (5th Ed.). The Law of Death-bed seems not unknown to our antient Law, *Glanv.* l. 7. c. 1. and of Mr. *Beames's* Translation, p. 140.

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As to the Reason of the Distinction between Conditions implied and expressed, with reference to Election, as applied to Freehold and Copyhold Estates against the Heir, *Quære*.

ficult to reconcile to those Principles, or to each other, some of the Decisions, which have taken place on this Subject. I do not understand, why a Will, though not executed so as to pass real Estate, should not be read for the Purpose of discovering in it an implied Condition concerning real Estate, annexed to a Gift of personal Property; as it is admitted it must be read, when such Condition is expressly annexed to such Gift (*a*). For, if by a sound Construction such Condition is rightly inferred from the whole Instrument, the Effect seems to be the same, as if it were expressed in Words. And then, if it be rightly decided, that a Will, defectively executed, is not to be read against the Freehold Heir, I have been sometimes inclined to doubt, whether any Will ought to be read against the Copyhold Heir; a Will, however executed, being as inoperative for the Conveyance of Copyhold Estate, as a Will, defectively executed, is for the Conveyance of Freehold Estate (1).

Distinction as to supplying the Want of Surrender in certain Cases to support a Devise of Copyhold Estate, and refusing to aid a defective Execution of a Devise of Freehold.

It is true however, that a Court of Equity does for certain specified Purposes look at a Will of Copyhold Estate to discover the Intention; and will supply the Want of a Surrender in order to effectuate the Intention so discovered; but has never attempted to supply the Want of the statutory Formalities in the Execution of a Will of Freehold Estate. We cannot therefore reason conclusively from the one Case to the other. But, whatever may be the Foundation of the Distinction, it is established; and what is now to be considered is, whether it be applicable to the Decision of the Case now before the Court.

This is, or is not, a Case of Election, according as

(*a*) *Boughton* v. *Boughton*, 2 *Ves.* 12. *Sheddon* v. *Goodrick*, 8 *Ves.* 481.

(1) See *Cary* v. *Askew*, 1 *Cox.* 241.

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the *English* Will is, or is not, to be read against the *Scotch* Heir. Where Land and personal Property are situated in different Countries, governed by different Laws, and a Question arises upon the combined Effect of those Laws, it is often very difficult to determine, what Portion of each Law is to enter into the Decision of the Question. It is not easy to say; how much is to be considered as depending on the Law of real Property; which must be taken from the Country, where the Land lies; and how much upon the Law of personal Property; which must be taken from the Country of the Domicil; and to blend both together; so as to form a Rule, applicable to the mixed Question, which neither Law separately furnishes sufficient Materials to decide.

Real Property regulated by the Law of the Country, where the Land lies: personal Property by that of the Domicil.

I have argued in the House of Lords Cases, in which Difficulties of that Kind occurred. Two of the most remarkable were those of *Balfour* v. *Scott* (*a*) and *Drummond* v. *Drummond* (*b*). In the former a Person, domiciled in *England*, died intestate; leaving real Estate in *Scotland*. The Heir was one of the next of Kin; and claimed a Share of the personal Estate. To this Claim it was objected, that by the Law of *Scotland* the Heir cannot share in the personal Property with the other next of Kin except on Condition of collating the real Estate; that is, bringing it into a Mass with the personal Estate, to form one common Subject of Division (*c*). It was determined however, that he was entitled to take his Share without complying with that Obligation. There the *English* Law decided the Question.

Intestate domiciled in *England*, leaving real Estate in *Scotland*, the Heir, being one of the next of Kin, entitled to share according to the Law of *England*, not subject to the Condition of collating the real Estate, according to the Law of *Scotland*.

(*a*) Stated in *Somerville* v. *Lord Somerville*, 5 *Ves.* 750. Reported 6 *Bro. P. C.* 550, (Ed. 1803). *Thorne* v. *Watkins*, 2 *Ves.* 35. *Bempde* v. *Johnstone*, 3 *Ves.* 198. *Pipon* v. *Pipon*, *Burn* v. *Allin*, *Amb.* 26. 415, &c.

(*b*) Reported 6 *Bro. P. C.* 601. (Ed. 1803).

(*c*) *Ersk.* Inst. Law of *Scotl.* 701, (5th Ed.).

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Intestate, domiciled in *England*, having real Estate in *Scotland*, the real Estate charged with a heritable Bond, as the primary Fund, according to the Law of *Scotland*; and not exonerated by the personal Estate according to the Law of *England*.

In *Drummond* v. *Drummond* a Person, domiciled in *England*, had real Estate in *Scotland*; upon which he granted a heritable Bond (*a*) to secure a Debt, contracted in *England*. He died intestate; and the Question was, by which of the Estates this Debt was to be borne. It was clear, that by the *English* Law the personal Estate was the primary Fund for the Payment of Debts. It was equally clear, that by the Law of *Scotland* the real Estate was the primary Fund for the Payment of the heritable Bond. Here was a direct *Conflictus Legum*. It was said for the Heir, that the personal Estate must be distributed according to the Law of *England*, and must bear all the Burthens, to which it is by that Law subject. On the other Hand it was said, that the real Estate must go according to the Law of *Scotland*; and bear all the Burthens, to which it is by that Law subject. It was determined, that the Law of *Scotland* should prevail; and that the real Estate must bear the Burthen.

In the first Case the Disability of the Heir did not follow him to *England*; and the personal Estate was distributed, as if both the Domicil and the real Estate had been in *England*. In the second the Disability to claim Exoneration out of the Personalty did follow him into *England*; and the personal Estate was distributed, as if both the Domicil and the real Estate had been in *Scotland*.

Question, whether an Instrument of any given Nature or Form is to be read against an Heir for the Purpose of Election, as belonging to the Law of real Property, determined by the Statute, regulating Devises of Land.

Effect of that, where the Land is in *Scotland*; and where the Domicil is in *Scotland*, the Estate in *England*, and an *English* Will imperfectly executed. As to the Soundness of the Principle, *Quære*.

Now what Law is to determine, whether an Instrument of any given Nature or Form is to be read against

(*a*) As to the Effect and Nature of an heritable Bond, see *Bell's* Comm. on Laws of *Scotland*, 206. *Ersk.* Inst. 194, and *Hope's* Minor Pract. 35.

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an Heir at Law for the Purpose of putting him to an Election; by which the real Estate may be affected? According to Lord *Hardwicke*, and the Judges, who have followed him, that is a Question belonging to the Law of real Property: for they have decided it by a Statute which regulates Devises of Land. Upon that Principle, if the Domicil were in *Scotland*, and the real Estate in *England*, an *English* Will, imperfectly executed, ought not to be read in *Scotland* for the Purpose of putting the Heir to an Election; and upon the same Principle, if by the Law of *Scotland* no Will could be read against the Heir, it would follow, that a Will of Land, situated in *Scotland*, ought not to be read in *England* to put the *Scotch* Heir to an Election.

Doubting much the Soundness of that Principle, I am glad, that the Case of *Cunningham* v. *Gayner* relieves me from the Necessity of deciding the Question; as, whichever Law is applied to the Decision of the present Case, the Result will be the same. As to the Law of *England*, a Will of Land in *Scotland* must be held analogous to that of Copyhold Estate in *England*; and the Will is equally to be read against the Heir. It was said, a Will of Copyhold Estate may have some Effect here upon the Copyhold: that is, if there is a previous Surrender: but then the Estate does not pass by the Will; which operates only as a Declaration of the Use. In that Respect there is no Difference between a Copyhold and Land in *Scotland*; for if in *Scotland* there be a Conveyance previously executed according to the proper feudal Forms, the Party may by Will declare the Use and Trust, to which it shall enure. If the Law of *Scotland* is resorted to as the Rule, the Case alluded to determines, that the *English* Will may be read against the *Scotch* Heir for the Purpose of putting him to an Election; that too in the strongest Case, that could occur;

Analogy between a Devise in *Scotland* and a Devise of Copyhold in *England*: the Will operates as a Declaration of the Use of a previous Surrender in the latter Case, and of a previous Conveyance, according to the proper feudal Form, in the former.

 for

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Election against a *Scotch* Heir, claiming under an *English* Will, not controuled by the Law of Death-bed.

for the Will is stated to have been made on Death-bed; liable therefore to the double Objection: first, that a Will cannot affect Land; and, secondly, that on Death-bed no valid Conveyance whatever could have been made: yet it was held, that, as the Heir took Benefits under that Will, it was not competent to him to dispute any Part of its Operation.

Upon the whole therefore the Heir must make his Election. The marital Rights of the Husband, who derives no Benefit from that Will, cannot be affected by that Election.

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BERKHAMPSTEAD FREE SCHOOL, *Ex parte*.

Charity regulated upon Petition instead of an Information, under the Act of Parliament 52 *Geo.* 3. c. 101.

The internal Management of a Charity the exclusive Subject of visitatorial Jurisdiction: but under a Trust as to the Revenue Abuse by Misapplication controuled in this Court.

Application of the Revenues of a Charity School for the Time past to the Master and Usher, according to their Title under a Decree, though considered a proper Subject of Review as to the future; and against the Objection of Non-residence, not acted upon by the Visitor as a Cause of Removal.

THIS Petition, presented under the late Act of Parliament (*a*), authorizing a summary Application, in Cases of Breach of Trust created for charitable Purposes, &c. stated, that previously to the Year 1741 an Information was filed, setting forth the Foundation of the Free-school of *Berkhampstead* under an Act of Parliament, 2 and 3 *Edward* 6. reciting Letters Patent, 33 *Henry* 8; incorporating the Master and Usher; and enacting, that they should hold the said Manors, &c., receiving certain Stipends: the King to appoint the Master,

(*a*) 52 *Geo.* 3. c. 101. (1).

(1) See the Cases on this Act, *ante*, 1 Vol. 497. Note 1.

and

and the Master to appoint the Usher, whenever Vacancies occurred; and the Warden of *All Souls'* College, *Oxford*, to have the visitatorial Power, and to remove the Master, if necessary; with a Proviso for the Master and Usher to make Leases for thirty-one Years or three Lives, subject to Waste, reserving the usual Rent, or more. The Information, alledging great Abuses by the Defendants the Master and Usher, particularly in letting upon Fines and converting the Fines to their own Use, prayed an Account of the Rents, &c., and all Fines arising by letting any Leases; with proper Directions for the Application of the Funds according to the Act of Parliament.

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BERKHAMPSTEAD FREE SCHOOL, *Ex parte*.

By a decretal Order, dated the 13th of *July*, 1744, declaring, that the Warden of *All Souls* was Visitor of the School, but that the Revenues were subject to the Jurisdiction of this Court, an Account was directed of the Rents and Profits of the Manors, &c., and of all Fines, received by the Master and Usher, allowing their Stipends, the Repairs, &c.: the Balance to be paid in; with Directions, that the Lands, then out of Lease, should be let with the Approbation of the Master; and, in case any Fines were taken, they were to be applied, first, to Repairs; reserving the Consideration as to the Residue; with respect to which any of the Parties were to be at liberty to lay a Scheme before the Master; and also as to the improved Income. By another Order, dated the 3d of *May*, 1753, it was declared, that the Court under the Letters Patent and Act of Parliament had Power to augment the Salaries of the Master and Usher; and a Reference was directed to the Master to consider of the Augmentations, &c.

The Master's Report, dated the 23d of *July*, 1754, and afterwards confirmed, approved the Scheme, laid before him by the Master of the School; that two-thirds

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STEAD FREE SCHOOL, *Ex parte.*

of what the Lands then produced, or the future increased Value, should be allotted to the Master and Usher; and the remaining third for the Repairs, Taxes, and Poor: that the Balance, due from the late Master, and the Fines, lately paid into the Bank, &c., should follow the same Course; and as to the Augmentation for the Time to come the Defendant proposed, that all the Rents, Issues, Fines, and Profits, arising from the Estate, after deducting Quit-rents, should be divided into three equal Parts, to be disposed of in the same Manner. By another Order, dated the 5th of *May*, 1790, the Master was directed to consider of a proper Plan for letting the Charity Estates in future, which by his Report, dated 30th *June* 1792, and afterwards confirmed, he considered to be by public Auction for thirty-one Years, or Lives determinable at that Period, partly on Fines, partly on Rents, conformably to the Plan, mentioned in the Report of 23d *July*, 1754: the Estates, as they should fall in, to be let from Time to Time with the Approbation of the Master.

In pursuance of that Order in *February*, 1813, certain Parts were let before the Master, at annual Rents, amounting to £267 : 12*s.* and on Fines amounting to £4300 : the other Parts of the Estates being let on Leases having eight or nine Years to run, at yearly Rents, amounting to £150 : 11*s.*

The Taxes, Repairs, &c., having greatly increased, so as to exhaust the one-third of the Rents, leaving no Part applicable to the Poor, the Petition insisted, that the Decree of the 13th of *July*, 1744, did not extend to future Fines; that the Order of 3d *May*, 1753, applied only to the Augmentation of the Salaries of the Master and Usher; that it was not the Intent of the Scheme, so approved by the Court, that Fines, payable on renewing or granting

Leases

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BERKHAMPSTEAD FREE SCHOOL, *Ex parte.*

Leases of the Charity Estate, should be divided as annual Profits; and that the Master and Usher were not entitled to the two-thirds of the £4300 now to be received for Fines, &c.; praying Directions for the Application of the said Sum of £4300, and of all future Fines and the future Management of the Estates and Income; that the Master may approve of a Scheme for that Purpose; and if necessary, review the former Scheme.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Barber*, in support of the Petition.

Mr. *Richards*, and Mr. *Leach*, opposed it.

The Lord CHANCELLOR.

This Petition is presented under the late Act of Parliament, giving Liberty to apply by Petition in a summary Way to have the Charity properly regulated.

The Declaration of the Decree, pronounced in 1744, that the Warden of *All Souls* is the Visitor, but that the Revenues were subject to the Jurisdiction of this Court, is perfectly agreeable to Law; and calls upon me to lay out of the Case all Circumstances relative to the Regulation of the School, which fall under the Cognizance of the Visitor. The Master of the School at that Time stated, that it was not his Fault, that there were no Scholars; that another School, established for teaching Arithmetic, had been found more beneficial to the Views of the Inhabitants of this Place: but the *Lord Chancellor* said, the Warden of *All Souls'* College, as the Visitor, had exclusive Jurisdiction upon that Subject: and, concurring in that Opinion, I have nothing to do with so much of this Petition as complains of the following Circumstances; upon which, if they afford Ground for Complaint, that Complaint must be addressed to the Visitor; that with a Fund,

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Berkhampstead Free School, *Ex parte.*

Fund, arising from Fines, amounting now to near £5000, to be distributed, two-thirds to the Master and Usher, and the remaining third to the Poor of the Parish, the Master is resident with one Scholar; and the Usher is living in *Hampshire.* All that is for the Consideration of the Visitor: if made the Subject of Complaint.

As to the Revenue, it has been decided by the Court, and is quite clear, that, where there is a local Visitor as to the Conduct and Management of the School, if, in the original Instrument a Trust is expressed as to the Application of the Revenue, this Court has Jurisdiction to compel a due Application. The Court has, in Fact and Practice, acted upon the Ground of such Jurisdiction; of which there is no Doubt (*a*).

The Construction, that has been given to the Act of Parliament and Charter, as to the Application of the Revenues of this Foundation, is this; confining myself now to the actual Application of the Rents previously to the Reference, directed by Lord *Thurlow* to the Master, to consider of a Scheme as to the future Application: but, without adverting to the several Orders, it may be represented in a general Way, that the Court had approved this Sort of Distribution of the Revenues of an Estate, let in the Way I shall mention. The Court has expressed an Opinion, that it has Authority to control the Power in the Master and Usher of leasing for three Lives or thirty-one Years, if it should appear for the Benefit of the Charity not to act upon that Power. Under the express Terms of the Power they are to lease, not for their own

Power of leasing in Trustees of a Charity controlled for the Benefit of the Charity.

(*a*) *The Attorney-General* v. *The Governors of the Foundling Hospital,* 2 *Ves.* jun. 52. *Attorney-General* v. *Dixie,* 13 *Ves.* 519. The Case of *Kirkby Ravensworth Hospital,* 15 *Ves.* 305, *Attorney-General* v. *Earl Clarendon,* 17 *Ves.* 491.

Benefit

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BERKHAMPSTEAD FREE SCHOOL, *Ex parte.*

Benefit only, but also in a given Proportion for the Benefit of the Poor of the Parish. Some Leases were made for Lives; some not for Lives; and until the Master's Report, under the Reference, directed by Lord *Thurlow*, it was never considered as a Plan to be generally acted upon, that all the Estates should be let upon Leases for thirty-one Years, or Lives determinable upon that Period, taking large Fines. The Court had however great Difficulty to determine, what was to be done with the Fines that had been taken: but the final Distribution of the Revenue has been of this Sort. The Distribution, contemplated by the Act of Parliament and the Letters Patent, being in Proportions, which altogether exhausted the whole, the Court thought, the Distiibution of the Revenues, when augmented, must be in the same Propor- portions; making an Addition to the Quota of each (*a*); and accordingly, where there were Leases upon Fines or Rents, the Distribution, actually made, was two-thirds, without deducting Taxes and other Outgoings, to the Master and Usher: the other third was applied to the Charges and Outgoings of all the three Shares; and what remained was distributed to the Poor of the Parish.

Application of the Increase of the Revenue of a Charity by Way of Augmentation to the original Objects.

Upon an Application to Lord *Thurlow* as to the Distribution of some of the Funds this seems to have struck him as a singular Management of a Charity Estate; and there is one material Petition and Order, bringing to the View of the Court this; which seems to have been forgotten in the Scheme that had been approved; that in consequence of this Species of letting, applied very generally, but not universally, when Leases were renewed upon Fines, there was something material coming to the Parish; that on the other Hand, after giving the Portion of the annual Rents to the Master and Usher, free of al

(*a*) *Attorney-General* v. *Tonner*, 2 *Ves.* jun. 1.

Deductions,

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Deductions, the remaining third for the Poor, after leaving all Outgoings upon the whole Estate, left nothing to be given to the Poor in those Years: the annual Charges eating out one-third of the Surplus; so that the Receiver was obliged to apply to the Court to authorize him to deduct from the other two-thirds the Deficiency of that third to answer those Charges; aiming at, though not distinctly praying, a Declaration, authorizing some Arrangement, that would give something to the Poor of the Parish: forming one of the Objects, to receive something annually.

Lord *Thurlow* made an Order, directing a Reference to the Master to consider of a better Scheme for letting the Estate. It probably occurred to his Lordship, that this Mode of letting operated directly to disappoint one Object of the Charity; and, that, if it was fit, that these Fines should be taken, as they would probably very largely increase, it should be considered, whether the Profit, arising in that Shape, should not be made a permanent Fund, yielding a permanent Revenue for the School-master and Usher, and their Successors, and, as to one-third, for the Poor; probably also thinking this not at all a proper Mode of letting a Charity Estate.

The Report, made in 1792, and approved afterwards by the Lords Commissioners, states the Ground, upon which the Master went, not only as to the Farms out of Lease, but as to all the Estates in future: the Leases not being less than thirty-eight in Number; and the Reasoning would apply equally to the Estate of any Tenant in Fee; that by letting without Fines needy Persons might become Tenants; the Tenants being to covenant to repair, and leave in Repair. The Report proceeds therefore to state, that, as the Leases should expire, all the Lands should be let upon Fines at small Rents. As a general

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neral Application, if there were no particular Circumstances, this Reasoning would in the Case of an Infant call upon the Court to take the same Course; as there might be very bad Tenants; who would not do Justice to the Farms: but the Answer to that would be, that good Tenants might be procured, who would do them Justice. Giving credit however to the Argument, that in the Covenant to build upon the Estate the Landlord may receive a Consideration for a long Lease, if the same Lease contains on the Tenant's Part a Covenant to sustain and leave all those Buildings in sufficient Repair, taking that to have been the Condition of all these Farms, upon what Ground am I to infer, that, though such a Lease was necessary in that Instance, it was equally necessary afterwards, when that very Lease provided, that those Circumstances, in Consideration of which such peculiar Leases were to be made, should not exist; and why, if that was proper as to one Farm, which required expensive Buildings, was every Farm, though not under the same Circumstances, to be let in the same Way; and again at the Expiration of those Leases, when no such Reason could exist:

In 1794 this Report was confirmed; and the Leases directed to be so made, not only then, but in all future time. Afterwards an Application was made to Lord *Loughborough* about the Taxes; who would only go the Length of giving to the Receiver what the whole annual Income of the Parish would not pay of those Outgoings, which the Receiver was not authorized to take out of the Proportions of the Master and Usher.

The present Application arises out of what passed in 1804; and there is Difficulty enough upon it; not in praying a Reference to the Master to review the Scheme, upon which the Estate is now let, with reference to the future, and to receive a Plan for the better

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ter Management of the Estate, and Distribution of the Revenue, having Regard to the Proportion of Division by the Letters Patent as to the original Income; but upon the Proposal for future letting; and, if the Master's Opinion should be in Favor of Fines, as to the Application of those Fines either as annual Revenue, or a permanent Fund, subject to the Approbation of the Court.

The first Difficulty is with regard to Persons, who under the Authority of the Court have actually contracted for Leases. It would be very difficult to dispossess those, who have become Tenants, or continued Occupation, relying upon the Faith of Biddings before the Master, that they were to have Leases. I wish therefore to know the Nature of their Contracts, the particular State of each Tenant as to his Lease and his Money. The Proceedings in this Charity from Beginning to End require me to say, that, if the present Scheme and Management are not for the Benefit of all the Objects of the Charity, it must no longer go on so; which is very different from the Consideration as to the Time past; having Regard to the Expectations of Persons, who have been dealing upon the Authority of the Court: much as I conceive the Court was mistaken in what was done in 1792.

I desire therefore to have a Statement of the respective Names of the Bidders, the Times of Bidding, of confirming the Report, and what was done with the Money, whether Fines or Purchase Money, at the Times of confirming those Biddings, or since. Refer it to the Master to consider of a Proposal, with liberty to any Party to lay Proposals before the Master, for the future Management of the Estate; with Power to review all the Plans, before adopted; and, if the Master shall be of Opinion, that it is for the Benefit of the Charity, that all or any of the Lands should hereafter be let upon Fines, or partly upon Fines,

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Fines, to be at liberty to receive Proposals, and to state his Opinion upon them as to the Application of those Fines, either as divisible at the Time they are paid, or being considered as a permanent Fund for the future Interests of the respective Objects of the Charity; and to state his Opinion upon all these Matters, having due Regard to the Letters Patent, the Act of Parliament, and all the subsequent Proceedings of this Court.

1814, *April* 28.

The Master and Usher presented a Petition; stating, that several of the Charity Estates had lately been let with the Approbation of the Master at increased Rents and Fines; the Fines amounting to £4303; and insisting, that the Petitioners were entitled, as their Predecessors, to two-thirds of the Money, arising from such Fines, in the Proportions, as between themselves, of two-thirds to the Master, and one-third to the Usher. The Petition, farther stating, that the Master had expended considerable Sums in substantial Repairs and Improvements, prayed an Account of the Money, so laid out, and an Application of the Fund in the Bank on Account of the Fines: viz. two-thirds to the Petitioners in the Proportions before stated: the Costs and Improvement to be paid out of the remaining third; and the Surplus to go according to the Act of *Edward* the 6th.

The Lord CHANCELLOR.

I am satisfied, that the Question, how these Fines for the Time past are to be disposed of, has devolved upon me as a Consequence of the Change of the Great Seal from Lord *Thurlow* to the Lords Commissioners in 1792. Lord *Thurlow's* Order was calculated to set right the Mode of dealing with the Estate, which had prevailed; and the Lords Commissioners did not sufficiently attend

to

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to the Principle, on which Lord *Thurlow* ordered a Review of the Application, directed by Lord *Hardwicke.*

The only Difficulty I have in this Case is upon the Point, whether I have any Thing more to do with the Fines for the Time past than to distribute them according to the existing Trusts, actually attaching upon them. Were I the Visitor, as I am not, I might state an Opinion: but I am out of my Place in observing, that, as Visitor, I should admonish the Master, or Usher, of this School in *Hertfordshire*, residing in *Somersetshire*, however usefully employed. The Master might as well reside elsewhere as the Usher: but both ought to be, where they will be ready to do the Duty, and can do it; and it is impossible to say, they can be as properly employed elsewhere, with reference to the Objects of this Foundation, as if they were resident in the Place, where that Duty is to be performed. This is a Royal Foundation under which the Master and Usher are Corporators. As long as they remain so, and the Visitor does not think proper to remove them, they must in a Court of Justice have the Enjoyment of all the Revenues, which belong to them by the same Instrument, that gives them the Corporate Character. The Question now before me is not as to their Conduct, but how the Rents and Profits have been actually given to the Persons, holding these Situations; and, unless I am to conclude, that from the Year 1792 an improper Mode of letting these Estates has prevailed in the Master's Office, I do not see my Way to refuse two-thirds of the Profits for the Time past; having no Right to withhold that, to which they have a present Title.

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Purchaser not compelled to take a doubtful Title; depending on the Questions, whether a Deed, not delivered, but merely retained by the Vendor, until Payment of the Money, could be considered as an Escrow: in that Case, as between a Judgment Creditor and the Assignees under the Bankruptcy of the Vendor, whether Payment to the Assignees would be a Performance of the Condition, making the Deed absolute from the Beginning, and any Conveyance from the Assignees inoperative: if not an Escrow, but absolute from the Commencement, whether with reference to the Statute 21 *James* 1. c. 19. s. 9, the Judgment would be operative as against the Lien of the Assignees for the Price; and, if not, what would prevent its attaching on the Estate.

UNDER a Decree for the specific Performance of a Contract by the Defendant to purchase an Estate, from *Henry Fry*, pronounced on the 5th of *August*, 1811, upon the Master's Report in Favor of the Title, a Conveyance by Lease and Release, dated the 21st and 22d of *October*, 1811, was prepared; and on the 4th and 7th of *November*, 1811, the Deeds were executed by *Fry* and other Parties; but not delivered to the Defendant; and, the Purchase-money not being paid, they were left with *Fry*, that he might get them executed by a Lessee. On the 16th *November*, 1811, *Fry* became a Bankrupt. The Bill prayed, that the Plaintiffs, as Assignees under the Commission, may have the Benefit of the former Suit and Proceedings, and that the Defendant may be decreed specifically to execute the Contract, and pay to the Plaintiffs the Purchase-money, according to the Decree; or that he may be declared a Trustee for the Plaintiffs, and may reconvey, &c.

The Answer stated, that previously to the Execution of the Deeds by *Fry*, the Defendant's Solicitor had received Notice of a Judgment, entered against *Fry*, for £1000, unsatisfied; and at the Time of Execution it was agreed, that the Payment of the Purchase-money should be postponed, until Satisfaction acknowledged of such Judgment

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and all other Judgments; that, after the Commission issued, another Judgment was discovered on Record unsatisfied; and previously to the Execution of the Deeds *Fry* and his Trustee had granted an Annuity; for the better securing which a third Judgment had been entered up; and was still unsatisfied; and that there was also a Petition in the original Cause by a Person, claiming an equitable Lien on the Purchase-money; suggesting, that the Judgment Creditors were necessary Parties to the Conveyance; and submitting to perform the Contract on having a good Title and complete Conveyance.

Mr. *Bell*, and Mr. *Wingfield*, for the Plaintiffs.

The first Question is, whether the Deed, executed by the Bankrupt, but left in his Hands, to be delivered, when the Money should be paid, at a future Time, is to be considered as any Thing more than an Escrow (*a*). If not the Consequence would be, that the Deed, not being perfect, when the Bankruptcy took place, was at an End; and the legal Estate, which remained in the Bankrupt, is in his Assignees; who may now convey. If that is doubtful, and taking the Instrument, that was executed, to have passed the legal Estate to the Purchaser, but to have been left with the Vendor, as in *The Derby Canal Company* v. *Wilmot* (*b*), until the Money should be paid, which remained unpaid at the Time of the Bankruptcy, a new and important Question arises, as to the Effect of the Statute (*c*), upon the previous Judgment; *Newland* v. *Beckley* (*d*), *Orlebar* v. *Fletcher* (*e*). Taking the Conveyance to have been perfected before the Bankruptcy, it re-

(*a*) *Co. Lit.* 36, (*a*).
(*b*) 9 *East.* 360.
(*c*) Statute 21 *James* 1. c. 19. s. 9.
(*d*) 1 *P. Will.* 92.
(*e*) 1 *P. Will.* 737.

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mained in the Hands of the Grantor, until the Business should be completed by Payment of the Money. Until that took place, the Purchaser, if he had the legal Estate, was a Trustee for the Assignees of the Bankrupt; from whom the Deed could never have been obtained without paying the whole Money. He cannot therefore now obtain the Estate on any other Terms. The Judgment Creditor, if allowed to extend the Land, comes in Competition with the other Creditors; in which Case, as was held in *Orlebar* v. *Fletcher*, the Statute declares that the Judgment Creditor shall receive only a rateable Satisfacfaction with the other Creditors; and, though that Case cannot be represented as an Authority upon this Point, the general Opinion certainly is, that, wherever the Conveyance is completed before the Bankruptcy, the Land may be extended in the Hands of the Purchaser; that the Execution must prevail against him; and it is indifferent to him, who takes the Money. When he comes in, and pays the full Purchase-money, to the Assignees, and not till then, he will be entitled to the full Ownership; and, if they can attach this Property in the Hands of the Purchaser, in consequence of his having the legal Estate, the Direction of the Act for a rateable Payment is produced.

Mr. *Hart*, and Mr. *Owen*, for the Defendant.

The first Question is, whether, this Judgment outstanding, the Purchaser is to be compelled to take such Title as the Assignees can give under these Circumstances. A Title so doubtful cannot be forced upon a Purchaser. For the Purpose of an Escrow the Deed must have a particular, though incomplete, Delivery; and the Effect is, that the Instant the Act is done, until which it is suspended, the Delivery being made, the Deed operates from its Execution. There can be no second Delivery;

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in which Respect there is a Distinction between the Case of an Infant and a married Woman; her Delivery being void. The Bankruptcy, therefore, can have no Effect upon the Principle of Law, by which the Escrow is converted into a Deed; and the Grantee takes Seisin from the Time, when the Deed was delivered. Here, however, is no Delivery as an Escrow. Such Delivery must be to a third Person, a Stranger, and not the Grantee, the adverse Party, though upon a similar Condition expressed: *Shep. Touch.* (*a*). This is a mere Retainer by the Grantor. There is considerable Doubt upon the Construction of the Statute; which does not exclude other Remedies previously existing. Neither of the Cases, that have been mentioned, decides, that the Judgment Creditor may not go upon the Estate, if he pleases.

The MASTER *of the* ROLLS.

It is very clear, that the Vendor could not have come for a specific Performance of this Agreement, except upon the Condition of exonerating the Estate from the Judgment Debt. The Assignees say, the Bankruptcy has removed all that Risk; as the Conveyance will be by them; and, as the Estate was not in their Hands liable to the Judgment Debt, it will not be liable in the Hands of the Purchaser, taking from them: and to shew, that the Title is to be considered as taken from them, they maintain, that by the Bankruptcy the antecedent Conveyance by the Bankrupt has become wholly inoperative. That depends upon very nice Learning as to the Doctrine of Escrows, connected with the Facts, as they may turn out in Evidence; and the Cases raise nice Distinctions upon the Effect of Acts and Expressions at the Time of the Execution.

Suppose this to have been an Escrow: a Question might be made by the Judgment Creditor, whether Payment to the Assignees would not be a Performance of the

(*a*) 58. Ed. 6.

Condition;

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Condition; and make the Deed absolute as from the Beginning: so that the Purchaser would take under it; and any Conveyance from the Assignees would be inoperative Suppose it is not to be considered an Escrow, but from the Circumstances, attending the Execution, it was absolute from the Commencement, it would then stand thus: the legal Estate would be in the Purchaser; but the Vendor would be a Creditor for the Price; and would have such Lien as the Law gives a Vendor for the Purchase-money. On his becoming Bankrupt, his Assignees are likewise Creditors for the Price; and succeed to his Lien. Then it would be a Question between them and the Judgment Creditor, whether, as against their Lien, the Judgment would be operative, and supposing it would not, what would hinder it from attaching on the Estate subject to the Lien? Without absolutely deciding each of these Questions, it is sufficient to say, that there is so much of Doubt upon them, that the Court will not compel a Purchaser to run the Hazard of their Decision.

It has been said, that every Title is good, or bad; and the Court ought to know nothing of a doubtful Title: but the Court has adopted a different Principle of Decision. It was not first introduced by Lord *Thurlow*, but is at least as old as Sir *Joseph Jekyll*'s Time (*a*), and was repeatedly acted upon by Lord *Hardwicke*.

The Rule against compelling a Purchaser to take a doubtful Title, at least as old as Sir *Joseph Jekyll*'s Time.

Therefore, as I shall not compel this Purchaser to take the Title, the Bill must be dismissed.

A Re-conveyance was afterwards directed; paying the Purchaser all his Costs.

(*a*) *Marlow* v. *Smith*, 2 *P. Will.* 198. See *Roake* v. *Kidd*, 5 *Ves.* 647, and the References. 16 *Ves.* 274, Note (*a*). *Ante*, Vol. I 493.

LINCOLN'S INN HALL.
1813,
July 28, 29, 31.

WOOD *v.* STRICKLAND.

Plea of Simony to a Bill for Tithes ordered to stand for an Answer with liberty to except, as being multifarious.

Leave to amend a Plea not of course, and the Amendments to be stated.

THE Bill was filed by the Rector of *Thorpe Bassett* in the County of *York*, for an Account of Tithes. The five Defendants joined in a Plea of the Statute of *Elizabeth* (*a*) to all the Discovery and Relief; averring, that the Church of *Thorpe Bassett* was at the making of the Act and long before and continually since and now is a Benefice with Cure of Souls within the Diocese of *York*; that the Reverend *James Graves* Clerk was in and for a long Time before *July*, 1807, the undoubted Rector and Incumbent of the said Church and Benefice; that he died in *July*, 1807; whereupon the said Church became vacant; that *William Wood Watson*, *Joseph Rider*, *Peter Owston*, and *William Rider*, were then, and still are, the undoubted Patrons; that afterwards and after the End of forty Days after the End of the said Session of Parliament, namely, in *August*, 1807, it was simoniacally, corruptly, and against the Form of the said Statute, agreed between the Plaintiff and the said *Watson*, *Rider*, *Owston*, and *William Rider*, that they should present the Plaintiff to the said Benefice in consideration that he should, during his Incumbency, accept and take from them such Patrons or their respective Tenants and Lessees the several yearly Sums after mentioned in lieu and discharge of all Tithes arising from their Lands, &c. within the Parish of *Thorpe Bassett*; namely, from *William Wood Watson* £6 : 7s. *per Annum*, from *Joseph Rider* £9 : 1s. *per Annum*, from *Peter Owston*, £9 : 1s. *per Annum*, and from *William Rider*, £9 : 1s. *per Annum*: that the Plaintiff did in *August*, 1807, in consideration of his being presented to the said Church, and to the End

(*a*) Stat. 31 *Eliz.* c. 6. s. 5.

that

that such Patrons might present him, promise and agree with them respectively to accept and take from them respectively, or their respective Tenants or Lessees, the several yearly Sums before mentioned in lieu of all Tithes arising on their respective Lands, &c. in such Parish, namely £6 : 17*s.* &c. The Plea then averred, that the Plaintiff did by the said Agreements and by each of them corruptly procure and seek the said Church and Benefice; and that at the Time of the said simoniacal Agreement with *Watson,* he *Watson* was, and long before, and ever since had been, and still is, the Owner of a certain Farm in the Parish of *Thorpe Bassett,* consisting of a Messuage and two hundred and forty-nine Acres of Land; that the great and small Tithes yearly arising from such Farm were at the Time the said simoniacal Agreement was made worth £50 *per Annum,* and that such yearly Value was well known to the Plaintiff and *Watson,* when they entered into the aforesaid Agreement.

The Plea then proceeded with distinct Averments, that *Joseph Rider* held a Farm of four hundred and forty Acres of Land, the Tithes whereof were worth £90, and so known to the Plaintiff and him, when they entered into the aforesaid Agreement; that *Peter Owston* held a Farm of one hundred and fifty Acres; the Tithes whereof were worth £30, &c. and a similar Averment as to *William Ryder*; that when the Church was vacant by the Death of *Graves,* namely, on the 15th of *October,* 1807, they the said *Watson, Rider, Owston,* and *Rider,* did, as the true Patrons, in pursuance and consideration of said simoniacal Agreements present the Plaintiff to the Archbishop of *York* for Institution, &c. that afterwards, in the same Month the said Complainant was upon the said Presentation admitted, instituted, and inducted; and the Plaintiff thereby corruptly took and accepted such Benefice; by reason whereof and by force of the Act of Parliament

 aforesaid,

1813.

Wood
v.
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aforesaid, the Defendants insist, that the Plaintiff was a disabled Person in Law to hold and enjoy the same Benefice.

Mr. *Hart*, Mr. *Leach*, and Mr. *Heald*, in support of the Plea.

The Agreement, while the Benefice was vacant, to accept, as Rector, a very inadequate Sum, in lieu of Tithes, for the Purpose of procuring the Presentation, is void, as simoniacal under the Statute; being a Contract between the Patron and Incumbent, for an Advantage to the former on obtaining Presentation; the Statute prohibiting Presentations from corrupt Motives. If the Plaintiff is not Rector, he has no Claim to Tithes; and it is competent to any one, even a Parishioner, or Occupier, in a Suit against him for Tithes, to take Advantage of the Statute, destroying that Relation, under which alone the Right can exist; admitting the Application to Glebe Land of the general Rule (*a*), that a Tenant cannot dispute the Title of his Landlord, *Cooke* v. *Loxley* (*b*). Though there is no Precedent of this Form of Plea in the old Entries, the Principle is countenanced by the Declarations in *Quare impedit*, to be found in *Finch* and *Wentworth*'s Pleadings. The Averment in the Plea, that the Session of Parliament ended at a Period long since elapsed, is to be found in the old Entries; and though perhaps scarcely necessary, cannot injure the Plea; which in its Averments corresponds with all the Act requires. *The King* v. *The Bishop of Oxford* (*c*) shews, that this Agreement is within the Statute; and all the Judges thought the Agreement simoniacal; as the Inhabitants derived a Benefit under it.

(*a*) *Dungey* v. *Angove*, 2 *Ves*. jun. 304.

(*b*) 5 Term Rep. 4.

(*c*) 7 *East*. 600.

Sir

Sir *Samuel Romilly*, and Mr. *Hall*, for the Plaintiff.

1813. WOOD v. STRICKLAND.

There is no Instance of a Plea of Simony to a Bill for Tithes: but if by Analogy to the Case in *Hobart* (*a*), that such a Plea is good to a Suit in the Spiritual Court for Tithes, it is a good Defence here, this Plea is ill-pleaded; and must be over-ruled upon Objections of Form. There is nothing better settled, than that a Plea must reduce the Defence to a single Point (*b*). In Equity a Defendant can never plead double; as he sometimes may at Law with leave (*c*). The Reason is, that if the Plea is over-ruled, or if the Plaintiff replies to it, and at the Hearing that Fact is not proved by the Defendant, it is then competent to him to go into other Defences. A Plea, which does not reduce the Defence to one Point, is merely an imperfect Answer: *Chapman* v. *Turner* (*d*). This Plea is clearly multifarious: *Whitbread* v. *Brockhurst* (*e*). *The Corporation of London*

(*a*) *Winchcombe* v. *Pulleston*, *Hob.* 168.

(*b*) Pract. Reg. 324. Lord *Red.* Tr. Ch. Pl. 234.

(*c*) Statute 4 and 5 *Ann.* c. 16. see *Law.* Tr. Plead. 27.

(*d*) 1 *Atk.* 54.

(*e*) 1 *Bro. C. C.* 404: cited from the following Note by Sir *Samuel Romilly*.

Lord THURLOW.

The Question now before me is merely a Question to direct the Pleadings of the Court in future; and is nothing more than this, whether it be possible to plead in one Plea all the Matters contained in this Plea.

Two inconsistent Facts cannot be joined in one Plea.

I cannot agree with the Defendant's Counsel, that any two Facts, which are not inconsistent, may be pleaded in one Plea. I think, that various Facts can never be pleaded in one Plea, unless they are all conducive to a single Point, on which the Defendant rests his Defence. Thus many Deeds may be stated in a Plea, if they all tend to establish the single Point of Title; so in the Case

Various Facts cannot be pleaded in one Plea, unless all conducive to a single Point of Defence; as several Deeds tending to establish the single Point of Title: so in the Case of Papacy.

1813. Wood v. Strickland.

don v. *The Corporation of Liverpool* (*a*); stating four Defences, by distinct, and independent, corrupt, Agreements, with the four Patrons; any one of which would have made the Presentation void; as it is not necessary,

Case of Papacy. (*Harrison* v. *Southcote*, 1 *Atk.* 528.) In the present Case, the different Matters pleaded do not conduce to one Object. The Plea of the Statute is in itself a Bar; but the Plea, that the Agreement was not performed, is quite distinct; because, whether a part Performance take the Agreement out of the Statute, or be considered merely as a Fraud, the Point of Equity is quite distinct from the Agreement. It is a Plea of two Matters perfectly and clearly distinct; of two Things, which furnish two different Pleas to the Points made in the Bill. The Reason, why a Defendant is not permitted to plead two different Pleas in Equity, though he is permitted to plead them at Law, is plain; it is because at Law the Defendant has no Opportunity, as he has here, of answering every different Matter, stated in the Bill. The Reason of Pleading in Equity is, that it tends to the forwarding of Justice, and saves great Expence, that the Matter should be taken up shortly upon a single Point: but that End is so far from being attained, if the Plea puts as much in Issue as the Answer could do, that on the contrary it increases the Delay and Expence. But why, it may be asked, should not the Defendant be permitted to bring two Points, on which the Cause depends, to issue by his Plea? The Answer is, because, if two, he may as well bring three Points to issue; and so on till all the Matters in the Bill are brought into Issue upon the Plea; which would be productive of all the Delay and Inconvenience, which Pleading was intended to remedy. Let the Plea stand for an Answer, saving the Benefit of it to the Hearing, and with liberty to except.

(*a*) 3 *Anstr.* 738.

that

that they should all participate in the corrupt Consideration. Then there is an Averment of a corrupt Promise, that the Rector would abstain from receiving all his Tithes; which certainly would of itself be simoniacal, and vitiate the Presentation. The Plea tenders Issues on the Value of the Sums stipulated, on the four corrupt Promises, on the Value of the Tithes of the four Farms; that is, twelve different Issues on the same Plea; all which Defences the Plaintiff must meet. There is no Instance of a Plea involving so much Litigation. The Number of Facts is immaterial, if they all tend to the same Point; but a Defendant cannot plead two separate Defences of the same Character; for Instance, that he is Heir *Ex parte Paternâ* and *Ex parte Maternâ*. If a Plea tenders two Issues, either of which, if established, is a sufficient Defence, the Plea is double, and therefore bad: *Nobkissen* v. *Hastings* (*a*). In *Beecroft* v. *Beecroft*, recently decided in the *Exchequer* (*b*), to a Bill for a Legacy the Plea of a Release, with an Averment, that the Release had been acted upon, was over-ruled, as double, and multifarious. This Plea states too much of the Act; but a Plea ought to state the Facts only, not the Law. The Clause, as to Forfeiture of double Value, is unnecessary, and the Averment, that the Persons presenting were the real Patrons. Except against the Crown, the Presentation is good; and therefore liable to be affected by simoniacal or corrupt Motives (*c*). The Averment, that the Plaintiff is disabled, is a Consequence and Conclusion of Law; and, therefore improper.

(*a*) 2 *Ves.* jun. 84.

(*b*) 14 *Ves.* 63, mentioned as *Beachcroft* v. *Beachcroft*. *Lord C. Eldon* questions that Case, 14 *Ves.* 65; considering, the Allegation, that the Release was acted upon, as mere Surplusage, which would not render a Plea at Law bad. *Co. Litt.* 303. b.

(*c*) 3 Inst. 153; see also 1 Inst. 120. Cro. *Eliz.* 789. *Baker* v. *Rogers*, 3 *Burn's* Eccl. Law, 30.

Mr.

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Mr. *Hart*, in Reply.

It seems to be conceded, that this Plea is good in Law, if correct in Form; and should it be over-ruled upon the Form, the Defendant would under *Nobkissen* v. *Hastings* (a), be allowed to amend. Admitting, that a Plea must reduce the Defence to a single Point, there is no Authority, that it may not tender more than one Issue: nor can it be represented, that it must be confined to a single Fact, if all the Facts stated tend to establish a single Point. The Averments are necessary to shew, that the Plaintiff is within the Act; and the Defendant was bound to state the Fact, as it really is: viz., not four separate Agreements, but a joint Agreement, though for distinct Considerations; the Words of the Act being "Person or Per-"sons." The Distinction is between the Plea itself, and the Averments in support of it; which are necessary to shew, that certain Acts have been done, bringing the Case within the Law, which constitutes the Defence. There is no particular Form of Averment; and certainly, no more Strictness can be necessary here, than in a Declaration on Covenant; nor can mere Surplusage vitiate the Plea (b). The Case of *Beecroft* v. *Beecroft* is not to be reconciled to Principle. Nothing is more usual than to set out a Statute; as in pleading the Statute of Frauds and the Statute of Limitations.

The Vice CHANCELLOR.

1813, *July* 31.

This Plea, though good in Substance, is liable to Objections of Form; being multifarious; not reducing the

(a) 2 *Ves.* jun. 84. 4 *Bro. C. C.* 252.

(b) *Claridge* v. *Hoare*, 14 *Ves.* 59.

Case

Cases to a single Point; but setting up four distinct, separate, simoniacal Contracts.

The next Question is, whether the Defendant can have Liberty to amend? In *Noblkissen* v. *Hastings* (*a*) the *Lord Chancellor* says, it is not usual to refuse that; giving Leave in that Case to plead *de novo*; as it was difficult to amend: but it is not to be understood, that an Application to amend an informal Plea is of course. As there appears to have been some Doubt upon it, I refer to the Authorities. In *Newman* v. *Wallace* (*b*) Lord *Thurlow* thus states the Rule: which is also given by Mr. *Wyatt* in his Edition of the Practical Register (*c*):

" With respect to any Amendment of the Plea, though " certainly there have been Cases, in which the Court has " permitted Pleas to be amended, where there has been " an evident Slip or Mistake, and the material Ground of " Defence seems to be sufficient, yet the Court always " expects to be told precisely, what the Amendment is to " be, and how the Slip happened, before they allow the " Amendment to take place."

Lord *Thurlow* repeats the same Opinion afterwards in *The Nabob of Arcot* v. *The East India Company* (*d*); declaring, having once given Leave to amend, that he should expect, when another Amendment is proposed, that the Form of the Plea they intend to put in shall be ready; for, properly speaking, Amendments, moved in this Court, ought to be stated; that the Court may see, whether it is proper that the Cause shall be farther delayed, to intro-

(*a*) 2 *Ves.* jun. 84.

(*b*) 2 *Bro. C. C.* 147.

(*c*) Pr. Reg. by Mr. *Wyatt*, 340.

(*d*) 3 *Bro. C. C.* 292. See 300. 310. 1 *Ves.* jun. 371. See 387, 393.

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duce them. The Motion to amend was in that Instance refused.* There are several Instances in *Anstruther's* Reports, Vol. I. and III. of amending Pleas: but it is sufficient to state Lord *Thurlow's* general Principle, that it is not of Course. The proper Mode therefore in this Case is, that the Plea, containing a complete, substantial, Defence, though informally pleaded, shall stand for an Answer, with liberty to except.

On a Plea found false the Plaintiff is entitled to a Decree; and, if Discovery is necessary, to examine Defendant on Interrogatories.

Supposing the Plea to be correct in Form, but proved false, it seems to be conceived, that the Course at the Hearing is to take it up just as if there was no Answer. That is not correct. Upon a Plea, found false, the Plaintiff is entitled to a Decree (1); and if a Discovery is wanted, the Defendant is ordered to be examined upon Interrogatories. This is stated by Lord *Redesdale* (*a*), referring to a Case before Lord *Hardwicke* (*b*).

The Plea therefore being ordered to stand for an Answer, with liberty to except, I shall not preclude the Defendant from making a Motion, explaining, how the Slip happened, and stating distinctly the intended Amendments: but it is not of course.

(*a*) Ld. *Red.* Tr. Ch. Pl. 240.

(*b*) 2 *Ves.* 247.

(1) At Law, Plaintiff recovers on Plea proving false. *Doct. Plac.* 180. 181. 232. "And note," says *Serjeant Hawkins*, "that Pleas in "Abatement being found against him that pleads them, are peremptory against him." *Abrid. Co. Litt.* 48. (Ed. 7). See also *Howard* v. *Jemmet*, 3 *Burr.* 1368. See *Parker* v. *Dee*, 1 *Ch. Ca.* 200, and *Curs. Cancell.* 184, as to false Plea in Equity.

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LINCOLN'S
INN HALL.
July 30.

DREW *v.* DREW.

Negative Plea of no Partnership.

Not necessary to answer to Circumstances, tending to the Point, upon which the Defendant relies, and tenders an Issue by his Plea.

Averment to Belief as to the Transactions of others sufficient.

THE Bill stated, that *John Drew*, deceased, the Husband of the Plaintiff, carried on the Business of a Lighterman and Coal Merchant at the Time of his Death in 1776; *John Drew*, his Son, being his Apprentice; that at the End of his Apprenticeship, in 1779, the Plaintiff and her Son agreed to carry on the Business in Partnership in the Proportions of two-thirds to the Plaintiff, and one-third to the Son; and in 1784 the Plaintiff admitted her Son to an equal Participation in the Business; which Partnership continued until the Son's Death; that he left the Defendants his Children and Legatees; one of whom, having taken out Administration with the Will annexed, had taken Possession of the Effects; and was proceeding to make Sale of the Leasehold Property. The Bill prayed an Account of the Partnership Dealings, &c.; a Sale of the Effects and the Leasehold Estates: an Injunction and Receiver; charging, that *John Drew*, the Son, was entrusted with the sole Management of the Concern; receiving all the Money, and taking Leases in his own Name.

One of the Defendants, the Administrator of his Father *John Drew*, with the Will annexed, put in a Plea in bar to the Discovery and Relief prayed; averring, that to the best of Defendant's Belief *John Drew*, he Son, did not at any Time in his Life agree to be, and was not, a Partner with the Plaintiff; and did not at any Time carry on the Business of a Lighterman and Coal-merchant or any other Trade or Business in Copartnership with the Plaintiff on the joint Account of the Plaintiff and the said *John Drew*, the Son, in any Shares and Proportions whatever.

Sir

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Sir *Samuel Romilly*, and Mr. *Daniel*, for the Plaintiff.

There is no Instance of a Plea of no Partnership: but this Plea is bad in Form; not averring positively, that there was no Partnership. The Defendant, being in Possession of all the Property in dispute, tenders an Issue of "Belief" only; on which an Indictment for Perjury would not lie. The Averment ought to have been as to his Knowledge of the Partnership. The Plea likewise covers too much; as the Plaintiff has a Right to an Answer, whether *John Drew*, the Son, did or did not, serve an Apprenticeship to his Father. It is in another respect defective; as, if there was no Partnership, the Plaintiff is entitled to an Account against the Representatives of *John Drew* the Son, in the Character of an Agent, intrusted with the Management of the Concern.

Mr. *Hart*, and Mr. *Roupell*, in support of the Plea.

This Bill in its whole Frame applies to the single Case of Partnership; and is properly met by the Plea, putting in Issue that only important Fact.

The Averment of "Belief" is all that can be required from this Defendant, speaking of the Acts of others; and, if he had Knowledge, swearing to his Belief, he would be liable to Indictment (*a*). The Doctrine is thus laid down by Lord *Redesdale*.

"In all Cases of negative Averments, and of Averments "of Facts not within the immediate Knowledge of the "Defendant, it may seem improper to require a positive "Assertion (*b*)."

(*a*) *Millar's* Case, 2 *Black.* 881. 3 *Wils.* 420.

(*b*) Ld. *Redes.* Tr. Ch. Pl. 236.

Mr.

Mr. *Daniel*, in Reply.

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It is indispensible that Information should be averred to. If this were an Answer, it would be insufficient, the Plaintiff being entitled to know, whether the Defendant has been informed. The Plea itself is quite one *primæ Impressionis*, the Books not affording even one solitary Instance of a Plea of no Partnership.

The VICE-CHANCELLOR.

This Bill calls for an Account of Partnership Transactions; and in its whole Frame is adapted and confined to that Object. The Plaintiff, therefore, if entitled to the Relief she now seeks, with respect to separate Property, entrusted to this Individual, and possessed by him, as an Agent, has by thus framing her Bill misled the Defendant; who, by this Plea denying the Partnership, destroys the whole Foundation of the Relief and Discovery prayed. All the late disputed Cases upon the Point, whether a Defendant can by Answer refuse a full Answer (*a*), admit, that the correct Mode of resisting the Claim of an Account is a Plea, denying the Relation, in which it is called for; as in the Instance, that has been put, of an Individual, setting up a Claim, as a Partner in *Child's* Bank; and in that Character requiring an Account of all their Affairs. In that Respect, therefore, the Plea is free from Objection.

The next Objection is to the Form of this, as a negative Plea, with an Averment merely to the Defendant's Belief. The Objection to it as a negative Plea, must depend upon the Nature of the Suit. The Claim as Heir, Executor, or Partner, can be met only by a negative Plea; if the De-

(*a*) *Rowe* v. *Teed*, 14 *Ves.* 372, and the References. *Leonard* v. *Leonard*, 1 *Ball* and *Beat.* 323.

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fendant means to deny the Plaintiff's Right to that Character. It is said, that the Defendant, speaking only to his Belief, is not liable to an Indictment for Perjury. Where a Person is speaking upon his Oath to Acts, not his own, but done by others, it is sufficient, if he states them upon his Belief: and more positive Averment is not necessary; and an Indictment for Perjury would lie against a Person, who with perfect Knowledge, that the Fact was otherwise, thus denied the Partnership: if, for Instance, the Person so swearing had been employed in the Concern, and had kept the Accounts between them, as Partners, he would certainly be liable for Perjury, upon clear Proof, that he had Knowledge, from which he must have formed a Belief of the Fact. This is said to be the ordinary Form of Pleading, where the Averment is negative: not denying, that the Defendant might have received such Information; but asserting upon his Oath that whatever Information he might have had it was not sufficient to produce Belief.

The only remaining Objection is, that the Defendant ought to have answered the Charge, that his Father was the Apprentice; as that Fact might afford some Evidence from the Probability, that he would be taken into Partnership: but it is not necessary to answer to every Circumstance, tending to the Point, upon which the Defendant relies, and tenders an Issue by his Plea.

This Plea therefore, being correct in Form, and sufficient in Substance, to the Bill, as framed, must be allowed.

STRANGE

1813, *July* 23, *Aug.* 2. 1814, *March* 11.

STRANGE *v.* COLLINS.

Supplemental Answer permitted to correct Mistake: but held strictly to Mistake, clearly sworn to, and probable in itself; the Solicitor, who put in the former Answer being dead; whose Letter, admitting the Fact contrary to that Answer, would not be Evidence in a Prosecution for Perjury against the Defendant; which ought not to be influenced by the Admission or Refusal of the Application.

THE Bill claimed a Legacy of £600 against the Defendant, as Administrator of his Father *John Collins*, the Executor of *Richard Collins*; by whose Will the Legacy was bequeathed. The Defendant by his Answer, sworn the 20th of *April*, 1813, denied, that he had obtained Letters of Administration to *John Collins*, his Father, or that he was his personal Representative, or had possessed in that Character his personal Estate and Effects; setting forth an Account of the Property, as Agent to his Mother.

A Motion was made on the Part of the Defendant, that he may be at liberty to put in a farther Answer; stating by his Affidavit, that upon looking over Papers and Deeds since putting in his Answer he found, that an Administration was granted to him of his Father's Effects in the Year 1797; at which Time the Defendant was but just of Age, but little acquainted with Business, and entirely ignorant of Law, and considering that he was only doing some formal Act, in order to make out a Title to some Leasehold Property of his Father, which he had sold; and not then knowing, that such Letters of Administration related to any of his Father's Property but such Leasehold Estate: that when he gave Instructions for, and swore, his Answer, he had no Recollection of the said Letters of Administration: or that they in any Way related to the Matters in Suit: that previously to the Time, when such Administration was granted, he did not know of what Effects his Father died possessed except the said Leasehold Estate, he living with his Mother; who kept the Accounts of the farming Business after her Husband's Death; the De-

 fendant

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fendant always considering her in Possession of such Effects, and never considering himself as having possessed the same; when he put in his Answer, not being aware, that the Leasehold Estate was Part of his Father's personal Estate, and believing, that all his personal Estate was in the Possession of his Widow, who always exercised over it full and uncontrolled Authority; that such Letters of Administration having been discovered since he put in his Answer, and it having been explained to him that in point of Law he had possessed himself of the personal Estate of his Father, he was extremely anxious to put in a farther Answer, admitting such Letters of Administration, and giving a full Answer and Discovery respecting such personal Estate and Effects.

Mr. *Agar*, for the Plaintiff, resisted the Motion, on an Affidavit, setting forth two Letters from the Solicitor, lately deceased, who had put in the Answer, stating, on the Part of the Defendant, that he would pay the Legacy within a limited Time with Interest, and reasonable Costs; although the Court would in Case of a Decree in the Plaintiff's Favor, "Mr. *Collins* being only the personal "Representative of his Father," direct the Costs to be paid out of the Legacy.

The Lord CHANCELLOR.

Aug. 2. This is a Motion of considerable Importance, for leave to file a supplemental Answer; the Object of which is to admit, that the Defendant is Administrator of his Father; and, as such, has Effects, sufficient to satisfy this Legacy; which the Answer denies. There is no Suggestion by Affidavit, that this Application is made in consequence of any Knowledge, or Threat of an Indictment for Perjury. The Application is supported by an Affidavit, stating positively, that, when the Defendant gave Instructions for, and swore, his Answer, he had no Recollection of the Letters of Administration; or that they in any Way related to the Mat-

ters

ters in the Bill; and that he never considered himself, but considered his Mother as altogether in Possession; she keeping the Accounts: a Representation not unnatural by an ignorant Man.

It is obvious, that, unless there is some general Ground, upon which the Defendant ought not to be permitted to put in a supplemental Answer, it is for the Benefit of the Plaintiff, that he should do so: but, whether the Plaintiff may choose to accept it, or not, Care must be taken, that public Principle is not infringed; and the Objection, that has been made, justifies me in requiring Commissioners to pay more Attention to Transactions of so solemn a Nature as taking Answers upon Oath, than has been applied in this Instance; in which there is a Degree of Carelessness which is shocking in moral Consideration: the Answer twice positively denying, that the Defendant is the Administrator, and that he ever possessed any Part of his Father's Effects: the former a pure Denial of a Matter of Fact: the other a Fact, upon which an ignorant Farmer might make a Mistake, but Commissioners, or the Attorney, could not.

The Letters, upon which this is resisted, are very material to shew, that the Attorney and his Client thought, this Demand might be made good in some Way; and would be material Evidence in a civil Suit. One Letter, stating expressly, that *Collins* is the personal Representative, is decisive Evidence, that the Attorney knew that Fact; and, as he is dead, it is impossible to say, how he afterwards permitted his Client to put in an Answer, twice denying positively, that he is the personal Representative: but, the Defendant by his Affidavit repeatedly pledging himself, that he did not know or recollect the Fact, it does not necessarily follow, that the Attorney knew it from *Collins*; or,

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that *Collins*, a young Farmer, if he knew the Fact, recollected it; and upon the Question, whether he swears honestly, that he was not Administrator, or is wilfully perjured, this Letter would not even be Evidence admissible before a Jury; much less would it be sufficient to convict him.

If this is to be regarded as a Question not merely of Benefit to the Plaintiff, as it is, but of public Policy, the Grounds, on which my Opinion is, that the Defendant ought to be permitted to put in this supplemental Answer are these; that, though that Permission might possibly have some Influence upon a Trial for Perjury, it ought to have none, justly and judicially speaking. On the other Hand, if, reasoning inaccurately, and without strict Regard to Principle, you conclude, that this Permission may operate in some Degree in his Favor upon the Trial, upon the same Species of Reasoning, the Refusal of it will be attended with the Hazard of Conviction, whether he ought to be convicted or not.

Declaring, therefore, that I do not conceive, a Court of Justice will act correctly, if it suffers my Permission or Refusal of this Application to operate in any Degree whatever upon a Trial for Perjury, I think, upon strict Principle I ought not to refuse it under this Explanation; and I cannot say, it is to be refused on the Ground, that Contradiction is fixed, not on the Defendant, but on his Attorney; which Contradiction could not be given in Evidence on the Trial; and, if it was, though a Speculation might be conceived, that he might have had the Fact from the Defendant, yet that Speculation could not be suffered to operate to his Conviction: there being so many Ways in which the Attorney might have acquired that Knowledge, consistent with the Fact, that he had it not from the Defendant.

Upon

Upon these Grounds therefore I permit this supplemental Answer to be filed after the most attentive Consideration; desiring to be well understood, that the Court does not yield to such an Application without the most careful Examination (*a*). 1813. STRANGE v. COLLINS.

The Defendant was ordered to pay the Costs. 1814, *March* 11.

A supplemental Answer was accordingly filed; by which he not only corrected the Mistake as to the Fact of the Administration, &c.; but also altered the State of the Accounts, as represented by his former Answer.

On this Ground a Motion was made to take the supplemental Answer off the File.

The Lord CHANCELLOR.

This supplemental Answer certainly goes too far. Upon the Defendant's Application for liberty to file a supplemental Answer, founded upon the Fact, that he had for a particular Purpose formerly taken out Administration to his Father, which through Mistake and want of Recollection he had denied, desiring to set himself right in that Respect, I understood, that he was merely to state the Circumstance of his having taken out Administration; and that a different View was therefore to be taken of his Possession of the personal Estate; not that he was at liberty totally to alter the State of the Funds; attributing his former Representation of them to Mistake. I cannot permit that; unless satisfied, that all that was also through Mistake.

The supplemental Answer was therefore ordered to be taken off the File.

(*a*) See *Livesey* v. *Wilson*, p. 150. *Edwards* v. *M'Leay*, *ante*, Vol. I. p. 149. and Note, *post*. 256.

1813,
July 31.
August 4.

COX *v.* NEWMAN.

Answer, taken by Commission abroad, ordered to be filed without the usual Oath of the Messenger under the Circumstances, that it had been opened by the Defendant's Solicitor, and afterwards read in the Presence of the Plaintiff, upon Affidavits of the Messenger, &c. identifying it, and accounting for its being opened, as the Effect of Accident: the farther Irregularity being cured by the Consent.

A MOTION was made on the Part of the Defendant, that his Answer, duly taken at *Baltimore*, in *America*, on the 7th of *November*, 1812, under a Commission, might be filed without the usual Oath of the Messenger; or that a new Commission should issue, &c.

The Affidavits of the Messenger, the Defendant's Solicitor, and other Persons, identified the Answer, as having passed to the Defendant's Solicitor in the same State, in which it was received by the Messenger from the Commissioners, neither defaced nor opened: but the Defendant's Solicitor, not being aware of the Contents of the Parcel, opened it; and finding what it was, immediately closed it again; and from that Time it was never out of his Possession, or opened, until by Agreement with the Plaintiff, it was opened and read in the Presence of him and his Solicitor, with the View of having it filed by Consent.

Mr. *Trower*, in support of the Motion.

There is no Decision to be found bearing upon the Circumstances, under which this Application is made: but in *Moseley* (a) there is an Observation, made at the Bar, and not contradicted by the Court, that Lord *Cowper* had obliged a Plaintiff to accept an Answer which had been through Ignorance opened at Sea. In *Boddam* v. *Riley*, the Answer was ordered to be delivered to the Register, to remain, until Affidavits should be produced, verifying the

(a) *Mos.* 39. (1).

(1) In *Smales* v. *Chayter*, 1 *Dick.* 99, the Irregularity had not proceeded to the Length of opening the Commission. Depositions are not to be opened until returned to the Six Clerk, and Publication passed. Ord. Ch. (*Ed. Beam.*) 111. 191. 221. 230.

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1818. Cox v. Newman.

Hand-writing of the Commissioners; from which may be collected, that a Habit has prevailed upon such Accidents of determining, whether the Answer should be received, or not. These Circumstances raise the strongest Case for relieving against the Consequence of the Accident, by which the Envelope, containing this Answer was broke open: a mere Accident clearly accounted for by the Oath of the Messenger, and of the Persons, who received it from him; establishing, that the Answer was not looked at except in the Presence of the Plaintiff and his Solicitor. Here is the Thing in the same State. The Defendant has committed no Fault. If through this Accident the Bill is to be taken *pro Confesso*, against whom has he a Remedy? This Case does not resemble those, which have occurred upon Applications to take an Answer without Oath ——— v. *Lake* (*a*). ——— v. *Gwillim* (*b*): this Answer having been duly taken upon Oath, its Contents cannot be vitiated by the subsequent Accident. If it cannot be received, the Defendant is at least entitled to a Commission, and Time to return it.

Mr. *Heald*, for the Plaintiff.

It is not to be contended, that the Defendant is to be prejudiced by this Accident; which is a very different Question from that of receiving the Answer under these Circumstances. The only Conclusion from the Cases, that have been mentioned, is, that there is no such Practice, settled and well known, as is alledged. This Answer having been opened, and improperly looked at upon Consultation of these Parties, the Plaintiff, his Solicitor, and the Defendant's Solicitor, there is an End of that Answer. If the Plaintiff can be bound by the Act of his Solicitor, the Agreement was only conditional: viz. if he should be satisfied with the Answer.

(*a*) 6 *Ves.* 171. (*b*) 6 *Ves.* 285.

Mr.

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v.
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Mr. *Trower*, in Reply.

The Order, sought by the Defendant, who applied as soon as he could obtain the Affidavit of the Messenger, does not violate any Rule, impede any Principle of Justice, or practise any Imposition on the Court. The subsequent Irregularity by looking into the Answer, originated with the Plaintiff and his Solicitor; who, having induced the Defendant's Solicitor improperly to look at it, are not entitled to complain of the Effect of their own Conduct: but all these Circumstances are so accounted for, that the Court is satisfied, that by directing it in the Exercise of a sound Discretion to be received no Rule is violated, and no Mischief can ensue.

The Vice-Chancellor.

The strict Rule, which must remain, as it always has been, inviolate, arises from Caution, to prevent any Danger of Alteration by requiring the Oath of the Messenger, identifying the Instrument, as that which he received from the Commissioners, and as being in the same State, in which he received it. The first Branch of that Rule is sufficiently complied with: here is the Oath of the Messenger, identifying this Paper to be the very Answer he received from the Commissioners; though he cannot complete the Proposition by adding, that it is in the same State. This Deviation however from the strict Rule is satisfactorily explained by these Affidavits; the Result of which is, that the Answer, being brought from the Commissioners not properly indorsed, was opened by the Defendant's Solicitor; who immediately stopped; and refrained at that Time from looking at it. Taking this Accident to arise from the Inattention of the Commissioners abroad, it is difficult to say, as it would not be conducive to Justice, that such an Accident, thus explained, and

not

not producing any bad Effect, shall not be set right. In the two Cases, that have been cited there was much more Irregularity; as there was not the Oath of the Messenger. In *Boddam* v. *Riley* the Answer, being deposited with the Register, was ordered upon being produced to the Clerk in Court upon Affidavit, verifying the Hand-writing of the Commissioners, to be received and filed without Oath; and the Court of *Exchequer* has permitted Answers to be filed with some Deviation from strict Regularity, but not without great Caution against bad Consequences.

The principal Objection here arises from the farther Irregularity by the Course, adopted by these Parties, instead of applying to the Court, consulting together upon the Answer with a View to have it filed by Consent without the regular Oath of the Messenger. It is said, the Plaintiff's Consent was qualified; depending upon his Solicitor's being satisfied; which may be understood, not satisfied with the Answer, as containing no Passage, operating against his Client, but satisfied, that there was no Irregularity. The Effect of this Irregularity is removed by the Consent of the Plaintiff; who cannot complain of that; and the other is the Consequence of a mere Accident, proceeding from the Inaccuracy of the Commissioners, which ought not to prejudice the Defendant. He is therefore not precluded from filing the Answer: but this is not to be considered a Precedent farther than that Circumstances may induce the Court to permit it.

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Aug. 7.

ROWLANDSON, *Ex parte.*

Distribution in Bankruptcy of Partnership Effects, as joint Property, after Assignment under an Agreement for Dissolution: the retiring Partner having obtained an Injunction and Receiver upon the Failure of the other to fulfil his Contract.

GEORGE and *Joseph Ancell*, Calico Printers, agreed to dissolve their Partnership on the 23d of *November*, 1810; that from that Day the Business should be carried on by *Joseph* alone; receiving and paying the Debts; taking the Lease, Stock, &c. at a Valuation; and paying *George* £1000, beyond his Share of the Stock, by Instalments, on the 1st of *January* and *July*, 1812, and the 1st of *January*, 1813; for securing which Payments *Joseph* was to give his Bills, and farther Security, to be settled by Arbitration.

A Bond of Arbitration was given accordingly; and an Award made in *January*, 1811. In *February*, *George* assigned all his Interest according to the Agreement; and gave up the Possession; but *Joseph* refusing to give his Acceptance, *George*, in *July* 1811, filed a Bill for an Account of the Partnership Effects; praying that the Defendant *Joseph Ancell* may be decreed to pay or secure the Instalments; and may be restrained from getting in and disposing of the joint Effects, and for a Receiver. On the 29th of *July*, 1811, an Injunction was granted; and a Reference directed for the Appointment of a Manager: but before any farther Proceeding *Joseph Ancell*, on the 20th of *January*, 1812, became Bankrupt; and on the 25th of *June* a joint Commission issued.

The Petition, presented by the Assignees, stated, that at the Time of Dissolution the Partnership was insolvent; and the Books, &c. were therefore not submitted to the Arbitrators; that the Transaction was a Fraud upon the joint Creditors; and the joint Property at the Time of Dissolution

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ROWLANDSON, *Ex parte.*

Dissolution ought to be divided among them; and accordingly praying a Declaration, that the whole of the Partnership Effects at the Time of Dissolution constitute joint Property; and may be distributed accordingly.

Sir *Samuel Romilly*, and Mr. *Cooke*, in support of the Petition: Mr. *Bell* against it.

The Lord CHANCELLOR.

Lien of a retiring Partner under an Agreement for Dissolution: not against the Creditors of the other, claiming either under a Title given to him, or, in case of Bankruptcy, Property left in his Order and Disposition within Statute 21 *James* 1. c. 19. s. 11. Joint Creditors have no Lien on the Partnership Effects, until Execution; which may be joint or several: their Equity after Dissolution depends on the Right of the Partners.

This Petition is important, and very special in the Circumstances. It is clear that *George Ancell* would have had a Lien upon the Effects of the Partnership as against *Joseph*: whether as against his Creditors is a different Consideration; and I do not mean to intimate, that the Lien would prevail; particularly with reference to the Bankruptcy; as, if one Partner puts another in Possession of Partnership Effects, leaving them entirely in his Order and Disposition (*a*), or giving him Title under an Instrument, it is very difficult to maintain a Lien; considering the Effect of the Law, resulting from the Fact, that he has by Title made that the sole Property, or has by his Conduct placed it under the Order and Disposition, of the other: but that is the Operation of Law; and, as I said in *Ex parte Ruffin* (*b*), which I think was right, the joint Creditors have no Lien upon the Partnership Effects prior to the Dissolution. They could only sue the Partners, and take Execution, joint or several, as they might: but until Execution there is no Process, by which, as Creditors, they could take the Partnership Effects: and the Equity for such Distribution is worked out through the Right of the Partners.

(*a*) Stat. 21 *Jam.* 1. c. 19. s. 11.

(*b*) 6 *Ves.*. 119. *Ex parte Fell*, 10 *Ves.* 347. *Ex parte Williams*, 11 *Ves.* 3.

The

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Ex parte.

The Bankruptcy took place on the 20th of *January*, 1812; Circumstances so standing from *January* 1811, until about six Months afterwards, when *George Ancell* filed a Bill; insisting, that this Proceeding by *Joseph*, taking Advantage of this executory Contract, and not fulfilling his own Obligation under it, was fraudulent; and praying, that unless he would make good his Part of the Agreement, the Court would apply the joint Effects as they ought to be applied between them. No Creditor had then any Lien; and the Court restrained *Joseph* from farther interfering; and appointed a Manager; taking the Administration of the Partnership Property into its own Hands. By the Effect of those Orders therefore, restraining *Joseph* upon the Equity of *George*, unless Consent can be clearly established from subsequent Conduct, this Property is not to be considered as in *Joseph*'s Order and Disposition, and as assigned to him. Therefore what remained of the Partnership Effects ought to be applied to the Partnership Debts as joint Property; without Prejudice to any intermediate Transactions, before the Date of the Commission; which are not before me.

I do not consider this Decision as in any Degree breaking in upon the Principle of *Ex parte Ruffin.*

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MALKIN, *Ex parte* (1).

A practising Attorney, negociating Loans in the Course of his Business, not a Money-scrivener, within Statute 21 *Jam.* 1. c. 19.

THE Issue, directed upon this Petition (*a*), was tried in the Court of *Common Pleas* at *Guildhall*, on the 2d of *March*, 1814, before Lord Chief Justice *Gibbs*, and a Special Jury; when a Verdict was found for the Defendants; establishing, that *Adams* was not a Money-scrivener within the Act 21 *Jac.* 1. c. 19. (2).

(*a*) *Ante*, 36.

(1) 2 *Rose*'s Bpt. Ca. 27. See in Matter of *Lewis*, 2 *Rose*'s Bpt. Ca. 59.

(2) Reported 2 *Rose*'s Bpt. Ca. 28.

PROMOTIONS IN TRINITY TERM.

Mr. *Dampier* was appointed a Judge of the Court of *King's Bench*, on the Resignation of Mr. Justice *Grose*.

Mr. *Copley* was called to the Degree of Serjeant at Law.

END OF THE FIRST PART.

CASES

IN

CHANCERY, &c.

1813, *53 Geo. 3.*

1813, *July* 30.

OSBORNE, *Ex parte* (1).

IN *December*, 1812, a Commission of Bankruptcy issued against *William Parr*; under which he was declared a Bankrupt. The Act of Bankruptcy was leaving his Dwelling-house at *Liverpool*, in 1807, and going to *South America*: the Deposition stating, that the Deponent was delayed in recovering his Debt; and, as he believes, other Creditors were delayed by such Absence abroad; not expressing any Motive as to his Departure.

Departure from the Realm or Dwelling-house, and the consequential Delay of a Creditor, not an Act of Bankruptcy without Proof, or necessary Inference, of an Intention to delay at the Instant of Departure. Pressure of Debts, though strong, not conclusive, Evidence of that Intention. A Creditor not a competent Witness to the Act of Bankruptcy or Trading.

The Petition prayed, that the Commission may be superseded upon two Grounds: 1st, That the Departure, not being stated to have been with the Intention of defeating or delaying a Creditor, was not an Act of Bankruptcy: 2dly, That a Creditor is not a competent Witness to prove an Act of Bankruptcy.

Before his Departure an Advertisement appeared in the public Papers at *Liverpool*; stating, that *William Parr*

(1) 1 *Rose* Bkpt. Ca. 387.

was

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OSBORNE,
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was going out to *La Plata* in the *Phœnix*; that she would be cleared for Sea within the Month; and he would take Charge of any Shipments by her; with a Reference for Freight, &c. to *Parr.*

Sir *Samuel Romilly*, and Mr. *Cooke*, in support of the Petition.

The Intention at the Time of Departure to delay a Creditor is essential to this Act of Bankruptcy. In *Gulston's* Case (*a*) he made it known, that he was going to the *West Indies*, to collect Debts, and make the most of his Property: it was contended, that the Departure without paying his Debts was an Act of Bankruptcy: but Lord *Hardwicke* did not consider it so, from the declared *bonâ fide* Object; having no View consistent with an Intention to delay a Creditor. *Fowler* v. *Padget* (*b*) followed that: the Departure, being for the very Purpose of procuring Money, was not an Act of Bankruptcy. The Doctrine of *Buller*, Justice, in *Woodier's* Case (*c*), was thought to extend too far. In *Williams* v. *Nunn* (*d*) the Plaintiff, having a Partner, might not have contemplated, as a Consequence, that his Debts would not be paid.

2dly. The Objection to the Evidence of a Creditor in support of the Commission is established.

Mr. *Hart*, for the Assignees, upon the second Point referred to Lord *Ellenborough's* Opinion in *Williams* v. *Stephens* (*e*), that, though a Creditor is clearly an incompetent Witness to increase the Fund, out of which he may

(*a*) 1 *Atk.* 193.
(*b*) 7 Term Rep. 509.
(*c*) *Bul.* Ni. Pri. Cas. 39. 1 *Cooke's* Bank. Law, 73.
(*d*) 1 *Taunt.* 270.
(*e*) 1 *Camp.* N. P. Cas. 152.

receive

receive a Dividend, he may be allowed to prove what barely goes to support the Commission, of which he has not availed himself.

The Lord Chancellor.

The Application to supersede this Commission is made upon two Grounds: 1st, That no Act of Bankruptcy was committed: 2dly, That the Act of Bankruptcy alledged is not established by Evidence, capable of proving it; being the Evidence of a Creditor; and it is perfectly settled, that a Creditor cannot prove the Act of Bankruptcy, to support the Commission. No Witness attending to prove the Act of Bankruptcy, an Adjournment took place; and at the next Meeting the Witness produced, had he been competent, does not prove an Act of Bankruptcy; proving the Departure certainly; but not even going the Length of stating, that it was with the Intention of defeating or delaying Creditors. That Omission, however, the Court would be disposed to overlook, if the Fact afforded the necessary Inference, that he must have departed with the Intent at that Instant to delay a Creditor. I also agree, that, if a Man is pressed with Debts at the Time of his Departure, that is strong Evidence of an Intention to delay Creditors; though I do not say with Lord *Ellenborough*, that I should have no Hesitation upon that; depending on all the Circumstances, affecting his Conduct, as proved at the Time. The Proof is very singular certainly; as shewing an Intention of delaying Creditors; that a Man, covered with Debts at *Liverpool*, declared by public Advertisement, that he was going out in a particular Ship to *America;* and would take a Cargo; informing his Creditors, and thus enabling them to disappoint his Intention of going abroad for the Purpose of delaying them.

Here is not therefore before me Evidence by any Means proving, that *Parr* did at the Instant of his Departure

 contemplate

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contemplate the defrauding or delaying his Creditors: but they desire now upon other Affidavits, that they may take the Chance of a Trial at Law; to see, whether they cannot prove such Intention. That is, I think, too much to grant in this Case: the Commission having issued a Year ago: the Commissioners after an Adjournment having considered the Proof sufficient; though it was not; and no Person is now mentioned, capable of being brought forwards as a competent Witness to prove the Act of Bankruptcy.

The Commission was superseded (*a*).

(*a*) See Mr. *Rose*'s Note to his Report of this Case, 1 *Rose*'s Bank. Cas. 387. *Wydown*'s Case, 14 *Ves.* 80. *Robertson* v. *Liddell*, 9 *East.* 487. *Bayly* v. *Schofield*, 1 *Maule* & *Selw.* 338.

Under an Impression, that the Interest of a Creditor proving the Act of Bankruptcy or Trading, formed one of the Objections overruled in *Bullock*'s Case (1 *Taunt.* 71. 14 *Ves.* 452,) that Circumstance was for some Time afterwards generally disregarded: but, the *Lord Chancellor* having repeatedly expressed his Opinion against such Evidence, the Inquiry is now always made; and an Undertaking not to prove under the Commission is required. This is attended with no practical Inconvenience: such Witnesses being usually Servants, to whom Wages are due; who are generally paid in full by the Assignees with the Sanction of the Commissioners. In Favour of *Lord Ellenborough*'s Distinction, that a Creditor, though an incompetent Witness to increase the Fund, out of which he may receive a Dividend (*Shuttleworth* v. *Bravo*, cited in *Norcott* v. *Orcott*, 1 *Str.* 650.), should be allowed to prove what barely goes to support the Commission, of which he has not availed himself, it may be observed, that his Evidence clashes with his pecuniary Interest in this Sense, that it is in support of a Proceeding, by which he may be compelled to take less than his Debt as a full Satisfaction.

——— v. TRECOTHICK.

1813, July 26.

Exceptions to the general Rule, entitling a Mortgagee to Costs.

MR. *Bell*, upon a Motion to vary an Order as to Costs between Mortgagor and Mortgagee, insisted, that there was no Instance of refusing a Mortgagee his Costs: the general Rule, which depends on a Principle of public Policy, with the View of encouraging Loans on Mortgage, requiring the Mortgagor always to be ready with a Tender.

Sir *Samuel Romilly*, and Mr. *Wilson*, for the Mortgagor, denied any such Rule, entitling a Mortgagee to Costs under all Circumstances; however vexatious and oppressive his Conduct may have been.

The Lord CHANCELLOR.

In general Cases, there is no Doubt, a Mortgagee is entitled to his Costs; but there are Exceptions; as in *Sidney*'s Case (*a*); where I refused a Mortgagee his Costs. In a Case before Lord *Thurlow* Lord *Lonsdale* had filed a Bill of Foreclosure; meaning not that the Estate should be redeemed, but to inflict a Chancery Suit upon the Defendant; who moved for a Reference to the Master to inquire, what was due; having found the Means of Payment; upon which the Plaintiff moved to dismiss his Bill. After that Conduct Lord *Thurlow* thought him entitled to Costs: but I have no Difficulty in saying, I would have refused them; as, admitting the Policy, that has been mentioned, of holding the Mortgagor to a Tender, yet if the Conduct of the Mortgagee shews, that, though re-

(*a*) *Detillin* v. *Gale*, 7 *Ves.* 583. See *Francklyn* v. *Fern*, *Barnard.* 30. *Baker* v. *Wind* 1 *Ves.* 160. *Morony* v. *O'Dea*, 1 *Ball* & *Beat.* 109, and the Note 121.

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peated Tenders should be made, he will not act upon them, I would apply the Doctrine of Law to that Case. The Rule is, I agree, almost universal: but Exceptions have been made. The Case however must go to the Extent I have mentioned.

LINCOLN'S INN HALL. 1813, *Dec.* 11.

HEYN's CASE (1).

Order for Security under a *Supplicavit* on Articles exhibited by a Wife against her Husband, under Statute 2 *Jam.* 1. c. 8.

ARTICLES of the Peace were exhibited under the Statute (*a*) by a Wife against her Husband; stating various Acts of ill Usage and Threats: that in *April* last, being compelled to leave him, she instituted a Suit now in Prosecution in the Consistory Court of the Bishop of *London*, praying a Divorce *a mensa et thoro*; and that since the Institution of that Suit he had made an Attempt to take her away by Force; that she is in great Fear and Danger, that he will take the first Opportunity of doing her some great bodily Injury, unless restrained by this Court; therefore praying, that he may be ordered to find sufficient Sureties for keeping the Peace towards the Exhibitant; and alledging, that she did not make the Complaint through any Hatred, Malice, or Ill-will towards her Husband, but merely for the Preservation of her Life and Person from bodily Harm.

Mr. *Bell* moved for a Writ of *Supplicavit* on the Part of the Exhibitant: who was sworn in Court; and the Case *Ex parte King* (*b*) was mentioned. The Security required was himself in £1000, and two Sureties in £500. He was a Surgeon.

The *Lord Chancellor* suggested, that there should be an Affidavit

(*a*) 21 *Jac.* 1. c. 8.

(*b*) *Amb.* 334. "5th "*August*, 1754. Upon Mo- "tion this Day made unto "this Court by Mr. *Attor*- "*ney-General*, and Mr. *Wil*- "*braham*,

(1) *Dobbyn*'s Case, *post*, Vol. 3. 183.

1813. HEYN's Case.

Affidavit as to her Circumstances: but, being informed, that it was not required in the Court of *King's Bench*, and that the Husband on his Marriage had received a Fortune of near £5000, made the Order on producing a Certificate of the Articles being filed in the Petty Bag Office; as in *Vancouver's* Case (*a*): but a few Days afterwards his Lordship directed the Security of each Surety to be reduced to £300.

" *braham*, of Counsel for the " said *Mary King*, and upon " producing certain Articles " of Misdemeanor exhibited " in this Court by the said " *Mary King* against *Benja-* " *min King*, Esq. her Hus- " band, attested upon the " Oath of the said *Mary* " *King*, and upon reading " the same, and also the Af- " fidavit of *Mary Darby*, " Spinster, and the Certi- " ficate of the said Articles " being filed, it is ordered, " that a special Writ of *Sup-* " *plicavit* do issue against the " said *Benjamin King*, ac- " cording to the Form of the " Statute in that Case made " and provided: and the " Surety to be taken thereon " is to be in the Sum of " £2000, and he is to find " two Sureties, who are to " give Securities in the Sum " of £1000 each." (Reg. Lib. A. 1753, fo. 386.)

With respect to the Question, at whose Request Surety of the Peace shall be granted, see 1. *Hawk.* 126. *Cromp.* 118. *Dalt.* c. 117. and *Burn's* Just. Vol. IV. p. 248, (15th Edition).

As to discharging the *Supplicavit*, see Mr. *Clavering's* Case, 2 *P. Wms.* 202. 2 Eq. Ca. Abr. pl. 1. *Baynum* v. *Baynum*, *Amb.* 63. *Ex parte King*, *Amb.* 240. 333. *The King* v. *Lord Lee*, 2 *Lev.* 128. *Ex parte* Sir *Richard Grosvenor*, 3 *P. Wms.* 103. *King* v. *King*, 2 *Ves.* 578.: and as to giving Securities, see 1 Term Rep. 696.

As a *Supplicavit* between Husband and Wife proceeds on the Supposition, that they are to live together, the obtaining it by a Wife does not justify her Elopement. *Head* v. *Head*, 3 *Atk.* 550 (1).

(*a*) Before Lord *Loughborough.*

(1) See other Cases on this Writ, Ord. Ch. (Ed. *Beam.*) 39, *note*, 144, *Stoel* v. *Botelar*, 2 Ch. Rep. 36.

1813, *July* 27.

KNIGHT *v.* YOUNG.

Execution of a Sequestration upon Mesne Process refused.

Decree *pro Confesso* not opened without a strong Ground: therefore not upon a general Affidavit of Derangement by the Party himself: Evidence more satisfactory, and extending to the whole Period, being required.

IN this Cause Cross Motions were made by the Defendant to get rid of a Decree *pro Confesso,* and that he may be at liberty to put in an Answer, on his own Affidavit, that he had been deranged; the Plaintiff desiring a Reference as to the Costs, and a Sale under a Sequestration on Mesne Process.

Mr. *Richards,* and Mr. *Johnson,* for the Plaintiff.

There is no Instance of yielding to the Application of a Defendant to have a Decree, taken *pro Confesso,* set aside. In the late Case of *Bolton* v. *Glassford* your Lordship, with every Inclination to assist the Defendant, could not do it; here are no Circumstances, but that at one Time during this Period of three Years and a Half the Defendant was out of Health; and that proved only by his own Affidavit. The Court ought to be satisfied, that he, a practising Attorney, was during the whole Time disabled from answering. The Plaintiff was driven to this Decree; and has used no unnecessary Dispatch.

As to the Cross Motion, the Sequestrators are in Possession; and the Expences must be paid out of the Property.

Mr. *Hart,* for the Defendant, urged, that no Inconvenience would follow from giving the Indulgence, prayed by the Defendant.

Upon the other Question he contended, that a Sequestration upon Mesne Process, which admits great Vexation, is

is not to be executed; citing *Heather* v. *Waterman* (*a*), and *Rowley* v. *Ridley* (*b*); where Mr. *Dickens* has stated his Opinion upon all the Authorities.

Mr. *Richards*, in Reply, denied that Rule; insisting, that Instances could be produced, where the Court, having put Sequestrators upon Mesne Process into Possession, acted upon it by paying the Costs out of the Property seized; directing a Sale for that Purpose; and that this Defendant is entitled to no Favor; persisting in a most deliberate Contempt; and leading the Plaintiff on through this expensive Process.

The Lord CHANCELLOR.

I cannot grant the Plaintiff's Motion; unless Authorities can be produced, contradicting the long Series of Authorities, asserting this Doctrine.

With regard to the other Application to let in a Party to answer, against whom a Decree *pro Confesso* has been obtained,

(*a*) 1 *Dick.* 335.

(*b*) 2 *Dick.* 622. *Shaw* v. *Wright*, 3 *Ves.* 22. *Simmonds* v. *Lord Kinnaird*, 4 *Ves.* 735. In that Case this Question was much considered, but not decided; and Lord *Redesdale*, then Solicitor-General, strongly controverts the Conclusion of Mr. *Dickens* from the Authorities, and the Orders, made in *Rowley* v. *Ridley*. The Statement, (4 *Ves.* 740.) that the Order for the Tenants to attorn to the Sequestrators was made by the Lords Commissioners, seems not strictly correct: that Order being made in *January*, 1784; and the Great Seal having been restored to Lord *Thurlow*, in *December*, 1783. According to Mr. *Dickens* that Order was made by Lord *Thurlow* upon a Representation of the Opinion of the Lords Commissioners; but his Lordship afterwards refused to act upon it.

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Decree *pro Confesso* distinguished from a Decree *Nisi*.

obtained, the Court has never done that without a strong Ground: being very tender of opening a Decree of this Sort; which is a Mode of obtaining the Judgment of the Court prescribed by the Legislature; not a Decree *Nisi*; such as the Plaintiff upon the Defendant's Default chooses to stand by. There are very few Instances of permitting a Defendant to open a Decree made upon his Default at the Hearing; the Court generally putting him to a Rehearing rather than allow him in this summary Way to set aside the Effect of his own Negligence.

In the Case of *Bolton* v. *Glassford* (*a*) I had Occasion to give this Subject great Consideration. A Distinction must certainly be admitted between Default, proceeding from Contumacy, and that, supposed in this Case to proceed from Imbecility of Mind: which cannot subsist together. The Court would be disposed to assist the latter Case: but the Fact must be established; and by other Evidence than that of the Defendant himself; the Evidence of Persons, in whose Judgment on such Subjects the Court is in the Habit of confiding. In *Bolton* v. *Glassford* the Defendants held out a long Time: but certainly did mean to have the Cause heard. Upon the Plaintiff's Application it was brought forward as a Cause, in which a Decree was to be taken *pro Confesso*: the Plaintiff conceiving himself entitled to that Decree; which he obtained accordingly. Upon the subsequent Application to let the Defendants in to hear the Cause notwithstanding that Decree, I called on them to shew, what they intended to do, had their Application at the Rolls been successful; and I found their Answers prepared; stating the Circumstances as to the Partnership; and admitting Assets; and the Truth of that Statement was established by many other Documents: but the only Relief I gave was by doing

(*a*) That Case will be reported 18 *Ves.*

them

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them Justice in controuling the Administration of Assets; not letting them in generally; as if the Cause had never been before the Court for Hearing.

This Application rests on nothing but the Defendant's Affidavit as to Imbecility of Mind; of which the Court must have other Evidence than that of the Party; and it must go to the whole Period. The Case is new in this respect, that the alledged Imbecility of Mind cannot be proved by the Party himself: but, unless that can be established by more satisfactory Evidence, I cannot grant his Application.

ROLLS. 1813, *July* 13. 15. *Aug.* 2.

WELBY v. WELBY.

Heir put to Election between Estates devised to him and descended; the Devisor having been Tenant in Tail of some, and Tenant for Life with the Reversion in Fee of others.

WILLIAM *Welby* at the Time of his Death, in 1792, was seised, among other Estates in the Counties of *Lincoln* and *Leicester*, of Lands at *Pointon*, as Heir Male of the Body of his Father *Richard Welby*, Devisee of those Estates in Tail Male under the Will of his Brother *William Welby*, and of the Manor of *Sapperton*, as Tenant for Life, with the Reversion in Fee, expectant upon Estates Tail to his first and other Sons, and Estates in strict Settlement to his Brothers *John* and *Richard*, and their first and other Sons, respectively, under a Recovery, suffered of that Estate to the Uses, declared by Indentures of *April* 1734, for the Purpose of confirming the Will of *Richard Welby*, as to Estates, of which he was only Tenant for Life or in Tail, in Favor of his younger Sons *John* and *Richard*. *John* dying unmarried in 1736, in Possession of the Estates at *Sapperton* and *Pointon*, and seised in Fee of Estates at *Fleckney*,

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Fleckney, devised all the Residue of his Estates real and personal, subject to some Legacies, to his Brother *William.*

William Welby, by his Will, dated the 15th of *September*, 1790, devised Estates at *Langford* and *Arlsey*, charged with his Debts in aid of his personal Estate, to his Son Sir *William Earle Welby*, the Defendant, in Fee; and all his Manors, Lands, &c. which he was entitled to before the Death of his late Brother *John Welby* deceased, and also all his Manors, Lands, &c. situate at *Sapperton* and *Pointon*, and at *Fleckney*, which were given and devised to him by his said Brother's Will, and all other the Lands, &c. whereof or wherein he or any Person in Trust for him had any Estate of Inheritance in Possession, Reversion, Remainder, or Expectancy, and whereof he had a disposing Power, to Trustees and their Heirs, to the several Uses following: as to the Manor of *Newton*, &c. to the Use of the Plaintiff *William Earle Welby*, his Grandson, and his Assigns for Life; with Remainder to Trustees to preserve contingent Remainders, to the first and other Sons of the Plaintiff in Tail Male and divers Remainders over: and as to all his other Manors, &c. to his Son Sir *William Earle Welby*, the Defendant, for Life, without Impeachment of Waste; with Remainder to the Plaintiff for Life without Impeachment of Waste; Remainder to Trustees to preserve contingent Remainders; Remainder to the first and other Sons of the Plaintiff in Tail Male; with Remainders over, and Powers of leasing and jointuring to his Son and Grandson.

By a Codicil, executed in *June*, 1792, the Devisor gave some after purchased Estates to the same Uses.

The

The Bill insisted, that the Testator, having devised Estates, of which he was seised in Fee, to the Defendant Sir *William Earle Welby*, his eldest Son, and Heir, in Fee, and taken upon him to devise the Estates of *Sapperton*, of which he was only Tenant for Life, and of *Pointon*, of which he was Tenant in Tail, to his said Son for Life, with Remainder to the Plaintiff for Life, &c., Sir *William Earle Welby*, taking considerable Benefits under the Will, ought not to be permitted to disappoint the manifest Intention of the Testator; and the Estates of *Sapperton* and *Pointon* ought to be settled to the Uses of the Will; praying a Declaration, that Sir *William Earle Welby* had by suffering a Recovery of the Estates of *Sapperton* and *Pointon* to the Use of himself in Fee, elected to take under the Wills of *William Welby*, the Elder, or *Richard Welby*, or under the Indentures of *April*, 1734.

Sir *Samuel Romilly*, and Mr. *Dowdeswell*, for the Plaintiffs, referred to the Case in *Gilbert* (a), as a decisive Authority, that the Doctrine of Election applies equally to the Heir as to a Stranger; contending, that the Distinction is immaterial, whether the Devise proceeds from Mistake, or from a wilful Design to dispose of the Estate of another; which was inferred as to the *Sapperton* n Application of the Testator to his Son, about six Months after the Execution of the Will, to join him in a Lease of that Estate, if either should so long live.

Mr. *Richards*, Mr. *Leach*, and Mr. *Pepys*, for the Defendant, contended, that the Testator's Intention, as declared, was to dispose only of Estates, to which he was entitled

(a) *Gilb.* Eq. Rep. 15. See *Thellusson* v. *Woodford*. *Bro-*
the Note (a), 13 *Ves.* 224, to *die* v. *Barry*, *ante*, 127.

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entitled under his Brother's Will; and that the Devise as to the *Sapperton* Estate applied only to the Reversion in Fee.

The MASTER *of the* ROLLS.

Aug. 2.

The Question in this Case is, whether the Defendant Sir *William Earle Welby* is bound to make an Election between certain Estates, devised to him by his Father, in Fee, and two other Estates, called *Sapperton* and *Pointon*; which, it is contended, the Testator has to a certain Extent devised to the Plaintiff, his Grandson; but which he had no Power to devise: the Defendant being entitled thereto as Tenant in Tail.

Devise in Fee to the Heir inoperative.

Ground of Election against the Heir, not only an implied Condition, that he shall confirm the whole Will, but also the Intention, in case the Condition shall not be complied with, to give the disappointed Devisees out of the Estates, over which the Devisor had Power, a Benefit correspondent with that of which they are deprived by such Non-compliance. Construction accordingly: viz. to the Heir absolutely, confirming the Will; if not, in Trust for the disappointed Devisees as to so much of the Estate, given to him, as shall be equal in Value to the Estates intended for them.

That an Heir, to whom an Estate is devised in Fee, may be put to an Election, although by the Rule of Law a Devise in Fee to an Heir is inoperative, I should have thought perfectly clear, independently of Lord *Cowper's* Decision in the Case in *Gilbert* (*a*); for, if the Will is in other respects so framed as to raise a Case of Election, then, not only is the Estate given to the Heir under an implied Condition, that he shall confirm the whole of the Will, but in Contemplation of Equity the Testator means, in case the Condition shall not be complied with, to give

(*a*) Anon. *Gilb.* Eq. Rep. 15.

the

the disappointed Devisees out of the Estate, over which he had a Power, a Benefit correspondent to that, of which they are deprived by such Non-compliance. So, that the Devise is read, as if it were to the Heir absolutely, if he confirm the Will; if not, then in Trust for the disappointed Devisees as to so much of the Estate, given to him, as shall be equal in Value to the Estates intended for them.

But in this Case it is said, that the Will has not given to the Plaintiff those Estates, which the Defendant claims as Tenant in Tail; and, if it has not, no Case of Election can arise That it has not is contended on different Grounds.

Devise of "my Estates "at *S.* which "were devised "to me by, or "purchased "from, *A.*" the Fact proving otherwise, not an intended Restriction, but an erroneous Description.

First, it is said, that the Devise is restricted to Estates, which were given and devised to the Testator by his Brother's Will. If, therefore, by his Brother's Will, he took nothing in those Estates, nothing will pass: if he took a limited Interest, that limited Interest only will pass: but I am of Opinion that the Words relied on are, not Words of intended Restriction, but merely an erroneous Description. The Testator does not give such Estates as were devised to him by his Brother's Will: but he says, "I give my Manors, Lands, Tenements, and Heredita- "ments, situate, lying, and being, at *Sapperton* and "*Pointon*, in the County of *Lincoln*, and at *Fleckney*, "in the County of *Leicester*, which," (i. e. which Ma- "nors, Lands, Tenements, and Hereditaments) "were "given and devised to me by my said Brother's "Will."

So, in several Parts of the Will he adds to the Description of an Estate the Words, "which I purchased" of such a Person. It could never be contended, that the specified Estate would not pass, though otherwise sufficiently

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Qualification restrained to the last Antecedent.

ciently described, on account of a Mistake in this additional Description. As little can it, I think, be contended, that, if the Testator had been the absolute Owner of *Sapperton* and *Pointon*, this Devise must have wholly failed, if it turned out, that it was not under his Brother's Will that he had become entitled to those Estates. It seems to me to be impossible to qualify this Clause by the Words, which come in at the end of the next, viz. "whereof or wherein I, or any Person or Persons in "Trust for me, have or hath any Estate of Inheritance in "Possession, Reversion, Remainder, or Expectancy, and "whereof I have a disposing Power;" for these Words clearly refer to those other Manors, &c. which he gave only in general Terms; and would not in point of Sense or Grammar apply to the Estates, which he had in the preceding Clause given by particular Description. The Fact is, that in *Pointon* the Testator had no devisable Interest whatever; he was merely Tenant in Tail of it: yet *Pointon* is expressly devised. With regard to that Estate therefore it seems to me to be clear, that the Defendant must make an Election.

Construction of a Devise, as applying to the Body of the Estate, or merely a Reversion, from the Combination of it with other Estates, the general Inaptitude of the Limitations, &c.

The Question as to the Estate at *Sapperton* admits of more Doubt. In that Estate he had a devisable Interest, namely a Reversion in Fee. There is therefore something to satisfy the Devise; and there is no such Necessity, as in the Case of *Pointon*, for holding, that the Testator meant to give what it was not in his Power to give. Yet a Man may as well suppose himself the absolute Owner of an Estate, in which he has only a limited Interest, as of an Estate, in which he has no Interest, or no devisable Interest, whatever. The Question is, what the Testator intended to include. The Plaintiff contends, that on the Face of this Will it is clear, that it was the Body of the Estate, the Land composing the Estate, and not a mere reversionary Interest in it, that was meant to be devised.

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All the Words of Description are applicable to the Land itself, rather than to an Interest in the Land. *Sapperton* is included in the same Description with *Pointon.* As to *Pointon* he could not be contemplating a reversionary Interest; for he had none in it. It was the whole Estate he meant to pass. Both Estates he speaks of as being his; and both as being alike devised to him by his Brother's Will. Both Estates had been enjoyed by his Brother *John*, as Tenant in Tail. He was merely Tenant in Tail of *Pointon*. In *Sapperton* he had also the Reversion in Fee. He gave by general Words all his real and personal Estate whatsoever to his Brother *William*: but *William*, being the Heir at Law, would take the Reversion by Descent, and not by the Will: so that in Truth he took nothing either in *Pointon* or *Sapperton* under *John*'s Will. *William*, however, probably forgetting, how the Estates had been settled at a remote Period, seems to have supposed, that he took by *John*'s Will the Estates, of which *John* had been in Possession. All the Words of *William*'s Will import, that he conceived himself to have the same Interest in *Sapperton* and *Pointon*; and that it was an absolute Interest which he had in both. The Limitations, which he makes of these Estates, are likewise the same; and they are Limitations adapted to Estates in Possession, and not to Estates in Reversion.

This Circumstance led to a Reference to those Cases, in which the Question has been, whether under general Words of Devise reversionary Interests should be held to pass; and, so far as the Nature of the Limitations may have had any Influence on the Decision, those Cases will in some Degree be applicable to the present; for, although in them the Question has been, whether the Will should extend to all the Interest, which the Testator had, and here it is, whether the Will shall not be held to extend to an In-

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terest, which he had not, yet the Argument, drawn from the Inaptitude of the Limitations, will bear on either Question. Where the Words are general, "all my Estates," and the Limitations are not adapted to an Estate in Reversion, the Argument is, such Estate was not meant to be included under the general Term. Where a particular Estate is expressly given, we cannot say, it is not included: but, if the Testator has only a reversionary Interest in it, and the Limitations are not adapted to such an Interest, the Argument is, the Testator must have conceived himself to have, or must have assumed the Power of giving, such an Estate as admitted of being so limited. The Question either Way is, whether it was not of Estates in Possession that the Testator meant to dispose; if it was, then the Effect in the one Case is, that to an Estate in Reversion the Devise is not to be extended; in the other, that to an Estate in Reversion it is not to be confined. Here the Reversion, which the Testator had in *Sapperton*, could not fall in, nor the Devise of it consequently take Effect, until there should be a Failure of all Issue Male of his own Body; and yet he limits the *Sapperton* Estate with others to his Son for Life, without Impeachment of Waste; with Remainder to his Grandson for Life, without Impeachment of Waste: Remainder to his first and other Sons in Tail Male: that is, he gives Estates for Life and in Tail to Persons, who must be dead, before the reversionary Interest could be enjoyed, which very reversionary Interest, depending on their Deaths, is what the Defendant says the Testator meant to give them for their Lives. He also gives to his Son and Grandson Powers of leasing and of jointuring: Powers, which can apply to nothing but Estates, of which they might be in the actual Possession. It is impossible that the Testator could mean to make so absurd a Disposition, as this would be, if confined to the Reversion.

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In *Strong* v. *Teatt* (*a*), where the Question was, whether under a general Devise of all other the Testator's Lands, Tenements, and Hereditaments, in the Counties of *Tyrone* and *Meath*, the Reversion of an Estate, settled on the Marriage of his Son *Henry*, would pass, the Court of *King's Bench* held, that though the Words were large enough to comprehend it, yet the Dispositions, which the Testator had made of his residuary Estate, were so very inapplicable to this reversionary Interest, that he could not possibly have meant to include it. Some of the Observations of Lord *Mansfield* apply directly to the present Case (*b*); stating Clauses of the Will inconsistent with any Supposition, that he meant to devise the Reversion of the Lands in Settlement, and Powers to whoever of his Sons should be seised of an Estate or Use for Life in the said Lands to commit Waste, to settle Jointures, and to make Leases: Powers, as Lord *Mansfield* observes, applicable to Possessions, and not to Reversions.

The Case of *Goodtitle* on the Demise of *Daniel* v. *Miles* (*c*), comes still nearer to the present. On the Marriage of *John Morton* Lands had been settled on him for Life, with Remainder to his Wife for Life for her Jointure: Remainder to the Heirs of the Body of the Wife by him: Remainder to *John Morton* in Fee. The Question on his Will related to this Reversion in himself, expectant on Failure of Issue of the Marriage. The only Children, living at the Time of making the Will, were two Daughters. He gave to his Daughter *Judith*, and to the Heirs of her Body, some Premises by particular Description, and all other his Freehold, Copyhold, and Leasehold, Lands and Houses, &c. whatsoever, and wheresoever, which he should be possessed of, or anywise entitled to

(*a*) 2 *Bur.* 912.
(*b*) 2 *Bur.* 921.
(*c*) 6 *East.* 494.

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at the Time of his Decease, and which were not settled in Jointure on his late dear Wife; and in case of *Judith's* Death, leaving no Issue of her Body, he gave all the aforesaid Premises to his Daughter *Ann* for Life; and after her Decease to the Child or Children of *Ann* as should be then living; and for want of such Issue to his Nephew in Fee. The Daughters having died without Issue, the Question was, whether the Plaintiff, who claimed under the Nephew, was entitled to the Estate, that had been in Settlement. As to the Words of apparent Exception, viz. "which were not settled in Jointure," it has been repeatedly determined, that by a Devise of Lands not in Settlement, the Reversion of Lands in Settlement would pass; and in *Glover* v. *Spendlove* (a) the same Thing was decided with respect to a Devise of all the Testator's Lands not settled in Jointure on his Wife: but then, coupling with these Words the Nature of the Limitations, the Court of *King's Bench* held, that in the Case before them the Testator could not have meant to include the settled Estate; even although it did not appear, that there was any other Estate, on which the general Words could operate. Lord *Ellenborough's* Observations (b) apply with equal Force to the Limitations in Mr. *Welby's* Will.

It was said in the Argument of the present Case, that it signifies nothing, how incongruous some of the Limitations may be, provided there be any, that can take Effect. Here, although the Limitations to the Son, and the Grandson, and the first and other Sons of the Grandson, are all perfectly absurd, and must be inoperative, as applied to the Reversion, yet the succeeding Limitations would in case of the Extinction of Male Issue have a Subject to operate upon; but that might equally have

(a) 4 *Bro. C. C.* 337. (b) 6 *East.* 500.

been

been said in *Goodtitle* v. *Miles:* the Limitation to the Nephew might have taken Effect when the Daughters died (as they actually did) without Issue. Indeed there would be no Room for arguing a Case, in which none of the Limitations could take Effect; for that would be to say, the Reversion passed, although it were so given, that nobody could take it.

In the Case of *Church* v. *Mundy* (*a*), which came first before me, and was afterwards before the Lord *Chancellor* on an Appeal, there being a Devise by general Words of all the Testator's real and personal Estate in Trust for his Wife for Life, and, in case of her Death without Issue, then upon Trust immediately after the Death of his Wife to release, assign, and convey, his said real and personal Estate to his Brother *Charles Mundy*, I was of Opinion, that a Reversion, depending on an Estate Tail in *Charles Mundy*, did not pass as the Estate, supposed to be given to the Brother after the Wife's Death, was one, which the Wife could not possibly take till after his Death. It struck me at that Time, that when a Man limits Estates in a particular Manner, he is to be understood as speaking of such Estates only as may by possibility at least go in that Manner. The *Lord Chancellor* certainly expressed a different Opinion; and supported that Opinion by some very cogent Reasoning; although with reference to the possible Result of an Inquiry, which he directed, he did not conceive it to be then necessary absolutely to decide the Question: but I think, that the Decision of it against the Heir of Law would have left untouched such a Case as the present, or as that of *Goodtitle* v. *Miles;* for his Lordship seems to have been much influenced by the Consideration, that, if the Brother had died before the Testator, an Event, which the Will expressly contemplated,

(*a*) 12 *Ves.* 426.

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the Devise would at the Moment of the Testator's Death have had its complete Operation in Favor of the Wife; as it certainly would, if a Term, not expressed, were implied; namely, that the Brother should have died without Issue.

It is obvious, how little Resemblance that Case has to one, in which the Testator sets out with a Series of Limitations, carried on through three Generations of Persons; the Extinction of all of whom in his own Life could not possibly have been in his Contemplation: but now I shall suppose, that there never had been a Case, in which general Words, that would of themselves include a Reversion, had been controlled by Reference to subsequent Limitations and Provisions: still it would not follow, that this Will should not be held to extend to the whole Interest in the Estates; for here we have no general Expressions to control. The Plaintiff is not obliged to set some Parts of the Will in Opposition to others; but contends, that every Disposition in the Will, as well as every Description in it, is applicable to the whole Body of the Estate.

When a Will purports to comprehend all Estates, and an Estate in Reversion is to be struck out of it, a Part of the Will is left inoperative: but here it is admitted, that the Will, as a Devise of the *Sapperton* Estate, is perfectly complete; and that, as applied to the Entirety of that Estate, there is not any one Part of it in the smallest Degree at Variance with any other Part of it. The Inconsistencies arise only from the Attempt to confine it to that reversionary Interest, which the Testator had in the Estate; and the Plaintiff refers to the Limitations only to shew the extreme Improbability, that the Testator could mean to pass less than the plain Words of the Will purport to pass. It is said, that notwithstanding all the Evidence,

Evidence, furnished by the Will, of an Intention to pass the whole Estate, it is yet apparent, that the Testator could not conceive himself to have had the whole Interest in it; as about six Months after the Execution of the Will he procured his Son to join in a Lease of it for sixty Years, if either should so long live; whereas, if he had thought himself Tenant in Fee, he could have granted a Lease of any Duration without his Son's Concurrence: but I do not see, how, supposing extrinsic Evidence to be at all admissible, the Will can be construed by Matters posterior to its Execution. What he knew in 1790 cannot be determined by Evidence of what he knew in 1791. Whatever may have been the Motive for joining his Son in the Lease, I very much doubt, whether it could be that he knew himself to be only Tenant in Tail with a Reversion in Fee; for with all the Anxiety, which the Will manifests, to keep the Estate in the Family as long as possible by making his Son and Grandson Tenants for Life, it is inconceivable, that he should not have acquired to himself the Power of making those Limitations effectual, if he knew, that, as Things stood, they would be wholly inoperative. However, with this supposed Knowledge of his real Situation, he confirms his Will, just as it stood. If, as it stood, it did comprehend the whole of this Estate, the Consequence would only be, that he chose purposely to confirm a Disposition, which he might at first have made through Mistake. An Assumption of Power to give what a Testator knows not to belong to him is at least as much a Ground of Election as a Disposition of what he has mistakenly conceived to be his own. Indeed some Judges have thought, though, as I apprehend, erroneously, that it is only when a Person knows the Estate he devises not to be his own, that the Doctrine of Election takes place.

Will, if extrinsic Evidence could be admitted, not to be construed by Matters posterior to its Execution.

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If, according to the sound Construction of the Will, the Estate, on which the Question arises, be comprehended in it, it is immaterial, whether it was by Mistake or Design that the Devise was made. It appears to me, that this Will does comprehend the Entirety of the two Estates of *Sapperton* and *Pointon*; and consequently that the Defendant is as to both of them compellable to elect. But I do not think, that by merely having suffered a Recovery of those Estates he can be considered as having made his Election.

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Effect of the Maxim, "*Pendente lite nihil innovetur*" limited to the Rights and Parties in that Suit; not absolutely annulling a Conveyance *pendente lite*.

Therefore a Plea in Bar to a Bill by a Purchaser from the Defendant, with actual Notice, over-ruled.

IN this Cause (*a*) the Defendant *Sarah Pulvertoft* pleaded in bar to the whole of the Bill, that the Plaintiffs purchased pending a Bill preferred by her against the Vendor, *James Richards Pulvertoft*, to have the Settlements carried into Effect; shortly after a general Demurrer to that Bill had been over-ruled (*b*); and with actual Notice of the Suit.

Mr. *Haslewood*, in support of the Plea (*c*).

This Plea is founded on the Maxim "*Pendente lite nihil innovetur* (*d*)." At Law, if the Defendant in a

(*a*) Reported *ante*, Vol. I. 180.

(*b*) *Pulvertoft* v. *Pulvertoft*, 18 *Ves.* 84. On the Effect of Transactions *pendente lite* See *Moore* v. *M'Namara*, *Falkner* v. *O'Brien*, 2 *Ball & Beat.* 186, 214.

(*c*) The Arguments *ex Relatione.*

(*d*) *Co. Litt.* 344, b.

real

real Action, or a Writ of Mesne under the Statute (*a*), alien *pendente brevi*, the Purchaser will be bound by the Judgment (*b*). So, if the Heir alien the Land descended, pending the Writ sued out by a specialty Creditor, the Land shall be charged in the Hands of the Purchaser (*c*): the Right to charge the Land as real Assets, being protected by the Pendency of the Suit.

In Equity the Court will give Effect to a Decree for the Plaintiff by compelling a Re-conveyance from a Purchaser, who has obtained the legal Estate after Institution of the Suit; though the full Value was paid; and he had no actual Notice that a Suit was depending (*d*). Though, where Lands are charged generally with Debts, a Purchaser with Notice may, paying his Purchase-Money to the Trustee (*e*), obtain from him a secure Conveyance, a Purchase, after a Creditor's Bill filed, will be set aside (*f*): equitable Assets being equally bound by a Suit in Equity, as legal Assets in the Hands of the Heir, by an Action of Debt. A Purchaser from an Heir, for valuable Consideration, without Notice of a Will, may by Plea or Answer protect himself from Relief or Discovery in a Court of Equity (*g*): but, if a Bill had been filed by a Devisee against the Heir, the Will being established, the Purchase

(*a*) Stat. *West.* 2. 13 *Edw.* I. c. 9.

(*b*) By Lord *King*, 2 *P. Will.* 483, in *Sorrel* v. *Carpenter*, 2 Inst. 376.

(*c*) *Co. Litt.* 102, a, b.

(*d*) *Flemming* v. *Page*, *Finch*, 320. Sir *Rob. Austin's* Case, cited by Lord *Nottingham* in *Barnes* v. *Canning*, Chan. Ca. 300. *Sorrel* v. *Carpenter*, 2 *P. Wms.* 482.

(*e*) *Sugd.* Law of Vend. and Purch. 3d. Ed. 372, and Cases there referred to.

(*f*) *Walker* v. *Smallwood*, *Amb.* 676.

(*g*) *Jerrard* v. *Sanders*, 2 *Ves.* jun. 458. See *Rowe* v. *Teed*, 15 *Ves.* 372. *Leonard* v. *Leonard*, 1 *Ball* and *Beat.* 323.

pendente

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pendente lite, though without Notice, would afford no Protection (*a*).

2dly. Where a Conveyance of an equitable Estate only has been made by the Defendant *pendente lite*, it is absolutely void as against the Plaintiff. If a Mortgagor convey the Equity of Redemption, pending a Bill of Foreclosure, it is not necessary to bring the Purchaser before the Court by a supplemental Bill; nor can he maintain a Bill for Redemption against the Mortgagee (*b*). The Purchaser of an equitable Estate, while the Suit is depending, is not a necessary Party; and none but a Party can exhibit a cross Bill. The Proposition, that he may institute an original Suit against the Plaintiff, would unsettle the Principle, which forbids the Interposition of a new Interest *pendente lite*.

These Plaintiffs are entitled to no Favour. They purchased with actual Notice of the Suit, for the manifest Purpose of contravening the Justice of the Court, and disappointing the Suitor of Redress; by their Bill, insisting on a better Title and more extensive Rights than the Party, from whom they purchased.

Mr. *Leach*, and Mr. *Wakefield*, *contra*.

It is not universally true, that an Alienation by a Defendant, *pendente lite*, is void as against the Plaintiff. A first Mortgagee, being a Defendant, may convey to a Judgment Creditor, also a Defendant in a Suit by a second Mortgagee; and the Purchaser *pendente lite* will hold against the Plaintiff, until his Judgment be redeemed:

(*a*) *Garth* v. *Ward*, 2 *Atk.* 175.

(*b*) *Bishop of Winchester* v. *Beavor*, 3 *Ves.* 314. *Bishop of Winchester* v. *Payne*, 11 *Ves.* 194.

Turner v. *Richmond* (a). The Argument, that an Alienation by the Defendant *pendente lite* is absolutely void as against the Plaintiff, proves too much; going to this Extent; that, though the Bill should be dismissed, the Purchaser could not sue. The Cases cited import no more than that the Suit may be carried on without bringing before the Court the Purchaser *pendente lite*; and there is no Authority, that another distinct Suit may not be instituted: nor any Instance where such a Plea as this has been allowed. If the Plaintiff, in the first Suit, does not think proper to give the Purchaser an Opportunity to file a cross Bill, is it reasonable, that all Access to the Court should be denied him? Is he, before he can render his Purchase available, to wait the Convenience of the Plaintiff; who has an Interest to protract the Cause, and to delay his Right? The *Lord Chancellor* by dissolving the Injunction determined in Effect, that the Defendant might alien (b).

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Mr. *Haslewood*, in reply.

In *Turner* v. *Richmond* (c) the Defendant did not introduce a new Party, by conveying the legal Estate to a Stranger. The Judgment Creditor was likewise a Defendant in the Cause. And there is no Rule, which forbids a Defendant to fortify his Title by purchasing the legal Estate.

The Purchaser may sue, if, and when, the Bill is dismissed: the Interest, which was protected by the Pendency of the Suit, being then determined. The Plea, not adverting to the Merits, states the latest Proceeding in the pending Suit, with reference to Lord *Bacon's* twelfth

(a) 2 *Vern.* 81.

(b) *Pulvertoft* v. *Pulvertoft*, 18 *Ves.* 84.

(c) See 11 *Ves.* 200.

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twelfth Ordinance (*a*); which seems to require that the Suit should have been carried on without any long Intermission. The Court cannot, in the Discussion of this Plea, try the Validity of the Titles of the Parties in the prior Suit; which may depend on a Variety of Circumstances, hitherto imperfectly disclosed.

The VICE-CHANCELLOR.

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If this Plea should be allowed, upon the Supposition, that the mere Institution of a Suit operates as an Injunction, the Effect would be singular; after what has passed before the *Lord Chancellor;* refusing an Injunction against making the Conveyance, and having already granted the Purchaser a Receiver (*b*): so far recognizing the Validity of the Conveyance. I have taken some Time to consider this Case, not from any Doubt upon it; but, several Authorities having been cited, for the Purpose of examining, whether they reach the Extent to which they have been pressed.

The Effect of the Maxim, " *Pendente lite nihil inno-* " *vetur;*" understood as making the Conveyance wholly inoperative, not only in the Suit depending, but absolutely to all Purposes, in all future Suits and all future Time, is founded in Error. If tha Maxim could be carried so far, it would produce this Consequence; that if the Suit, instituted by the Wife against her Husband in this Case, failed, and the Purchaser instituted a new Suit to avail himself of his Purchase, he could have no Benefit of it

(*a*) See *Bac.* Law Tracts, (Oct. Ed. 1737.) p. 282.— " If there was any Intermis- " sion of Suit, or the Court " made acquainted with the " Conveyance, the Court is " to give Order upon the " special Matter according to " Justice.' See Ord. Ch. (Ed. *Beam.*) p. 8, & note 20.

(*b*) *Ante*, Vol. I. 180.

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it in Law or Equity; being null and void, when executed. These Expressions must be taken in a qualified Sense; and the true Interpretation of this Rule is, that the Conveyance does not vary the Rights of the Parties in that Suit; that it gives no better Right, having no Effect with reference to any beneficial Result against the Plaintiff in that Suit; and it is very reasonable, that the litigating Parties should be exempted from the Necessity of taking Notice of a Title, acquired under such Circumstances. With regard to them it is as if it had never existed: otherwise Suits would be indeterminable; if one Party pending the Suit could by conveying to others create a Necessity for introducing new Parties. The voluntary Act therefore of the Defendant, conveying to another, cannot vary the Situation, or affect the Rights, of the Plaintiff. The *lis pendens* is presumptive, if not actual, Notice; and the Purchaser is in the same Situation, in which the Vendor stood; upon this plain Principle, that the Suit is to be decided according to the State of Things, when it was instituted; and the Rights, however they may be varied by Death, Bankruptcy, &c. cannot be affected by the voluntary Act of either Party.

Purchaser *pendente lite* from the Defendant in a real Action bound by the Judgment.

So upon a Writ of Mesne under the Stat. *Westminster* 2.

This is the Principle, running through all the Cases both at Law and in Equity. In a real Action, notwithstanding a Conveyance pending the Suit, the Defendant, is treated with reference to the Execution, as if he remained a Party. So upon the Writ of Mesne, in the second Institute (*a*). The Judgment in the real Action will over-reach an Alienation pending the Writ: as, if the Alienation had any Effect to defeat the Judgment, it would have all the Effect I have stated. The Authorities establish this Proposition; that Alienation pending a Suit gives no new Right; and does not vary the Rights of the litigating Parties: the Alienation of the Defendant for the Purpose of that Cause

(*a*) 2 Inst. 376.

has

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has no Effect as against the Plaintiff; who is entitled to proceed, as if no such Title existed: and it would be extraordinary, that in another Suit, with other Parties, for other Purposes, it should not be so considered; depending upon the Rights to convey and to purchase, and the consequent Propriety of that Suit.

There is no Instance of offering this as a Bar; and the Reason is obvious. This is in the Nature of a Cross Bill. The Purchaser could not have the Benefit of his Purchase in the Suit depending; if at all, he could only be introduced as a Defendant. If he had a Right to purchase the Husband's Interest, he must, to obtain the Benefit of his Purchase, institute a Suit himself to have the Contract carried into Execution. If the Wife succeeds in the Suit against her Husband, the Purchaser must ultimately fail: but, if her Bill should be dismissed, he may enforce his Contract against the Husband and the Trustee; and may call for the legal Estate. He is not to wait until the Suit, depending between the Husband and Wife, shall be disposed of; but has a Right to file a Bill for his own Object; to which the Pendency of the other Suit cannot be pleaded.

The Principle is so clearly stated in some of the Cases, that it is unnecessary to go through them all. In the most recent one, *The Bishop of Winchester* v. *Paine* (a), the *Master of the Rolls* in his clear and luminous Manner states precisely the Proposition, upon which I put this Case; that, though ordinarily the Decree binds only the Parties to the Suit, he, who purchases during the Pendency of the Suit, is bound by the Decree, that may be made against the Person, from whom he derives Title:

(a) 11 *Ves.* 197.

as

as between the litigating Parties any Person, coming in by Conveyance pending the Suit, is bound by the Right of him, from whom he takes: as to them it is as if no such Title existed; referring to the Case put by Lord *Hardwicke* (a) in *Garth* v. *Ward*, of an Assignment of the Equity of Redemption pending a Bill for Redemption, putting the Assignee upon the same Footing as the Person, from whom he obtained the Assignment.

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Assignee of the Equity of Redemption pending a Suit for Redemption bound by the Decree.

One of the strongest Cases is *Walker* v. *Smallwood* (b); that the Purchaser of an Estate, charged with Debts, pending a Suit by Creditors is bound: but the concluding Passage of Lord *Camden*'s Judgment, declaring, as a general Rule, that an Alienation pending a Suit is void, must be understood with reference to the Subject he is speaking of, not absolutely. In *The Bishop of Winchester* v. *Beavor* (c) Lord *Alvanley*'s Opinion is merely that an Attempt to introduce a new Incumbrance to the Prejudice of the litigating Parties by a Judgment confessed after the Bill filed would not do. *Sorrel* v. *Carpenter* (d), *Turner* v. *Richmond* (e), and the obscure Case in Chancery Cases (f), do not go farther than avoiding the Conveyance with reference to the Suit depending, not to all Purposes.

Purchaser of an Estate, charged with Debts, pending a Suit by Creditors, bound by the Decree.

Judgment confessed after a Bill of Foreclosure ineffectual against the Plaintiff.

These are the principal Authorities referred to; and not one of them carries the Doctrine to the Extent, that this can be set up as a perpetual Bar to any new Suit; whatever may be the Result of the other. The Purchaser stands in this Suit upon his clear Right against the Husband;

(a) 2 *Atk.* 175.
(b) *Amb.* 676.
(c) 3 *Ves.* 314.
(d) 2 *P. Will.* 482.
(e) 2 *Vern.* 81.
(f) Ch. Ca. 300.

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band; not interfering with the other; or in any Way varying the Rights of the Wife: the latter Suit not affecting the Rights of the Parties litigant in the former, is consistent, and may proceed with it; and the mere Pendency of that Suit is not a Bar to any Relief, to which this Plaintiff may be entitled.

The Plea was over-ruled.

1813, *Aug.* 11.

THE ATTORNEY-GENERAL *v.* GEE.

A Peer not to be the Receiver.

ONE of the Relators, being a Peer, was proposed as the Receiver, to act without Fees.

Mr. *Hart*, for the Relators.

Sir *Samuel Romilly*, for the Defendants, did not oppose the Proposition; but suggested, whether a Peer could with Propriety be appointed a Receiver; as the same Remedies cannot be had against a Peer as against a Commoner.

The *Lord Chancellor* said, there is an Objection to appointing a Peer Receiver: in many Instances a Receiver may be committed. (1)

Another of the Relators was therefore appointed.

(1) *Davies* v. *Cracraft*, 14 *Ves.* 143. The Duties of a Receiver so far as they are prescribed by positive Order, will be found, Ord. Ch. (Ed. *Beam.*) 454. 461.

FARLOW.

1813.
Aug. 11.

FARLOW, *Ex parte.*

No Right to the Bankrupt's Allowance by Payment of Dividends to the joint Creditors under the usual Order for a Distribution of the joint Estate under separate Commission.

UNDER a separate Commission against one Partner the usual Order was made for distinct Accounts and a Distribution of the joint Property to the joint Debts. The joint Estate having paid in Dividends 18*s.* in the Pound, and the separate Estate 2*s.* the Bankrupt presented a Petition, praying his Allowance under the Statute (*a*); which, having been dismissed (*b*), was again mentioned.

Mr. *Cooke* (*Amicus Curiæ*) said, that the joint Creditors, being admitted under a separate Commission by Order, were considered as coming in under the Decree of a Court of Equity, not under the Statute.

The *Lord* CHANCELLOR said, he had looked into the Statutes; and was satisfied, that he was right in refusing the Allowance.

(*a*) Stat. 5 *Geo.* 2. c. 30. s. 7.

(*b*) *Ex parte Farlow*, 1 *Rose*, 421. See the Cases collected by Mr. *Rose*; and Mr. *Christian*'s Observations, 1 *Christian*'s Bank. Law, 137, &c. *Holmes, Ex parte*, *post*, 3 Vol. 137. & 2 *Rose*, Bank. Ca. 95. *Powell, Ex parte*, 1 *Madd.* 68.

HARRIS

1813,
Aug. 12.

HARRIS, *Ex parte* (*a*).

Under a joint Commission of Bankruptcy no Proof for either the joint or separate Estate against the other, unless the Debt arose by Fraud, as distinguished from Contract; as by an Act against the expressed or implied Contract, and without the expressed or implied Authority of the Co-partner; as by over-drawing, to increase the separate Estate; or under Circumstances implying Fraud; as for private Purposes, without the Knowledge, Consent, Privity, or subsequent Approbation, of the other; inferred from his giving the whole Control to his Partner.

UPON the Petition of the Assignees under a Commission of Bankruptcy against *Ramsey* and *Aldrich*, praying Liberty to prove against the separate Estate of *Ramsey* a Debt of £1082, the Commissioners were directed to inquire, whether *Ramsey* without the Knowledge or Privity of *Aldrich*, and with the fraudulent Intention to increase his separate Estate, took that Sum of Money out of the joint Estate (1).

The Commissioners having certified under that Reference, that *Ramsey* took that Sum from the joint Estate without the Knowledge or Privity of *Aldrich*, but not with the fraudulent Intention to increase his separate Estate, another Reference was directed to them, to inquire, whether *Ramsey* with the Privity, Contract, or subsequent Approbation, of *Aldrich*, took that Sum from the joint Estate to increase his own separate Estate.

The Commissioners by their second Certificate stated, that the Terms of the Partnership were settled by a Deed; declaring, that all Money, belonging to the joint Estate, received by either of the Partners, should once a Month at least be paid into a particular Bank; and that each might draw out £50 a Month, but no more, for his respective Use; that *Ramsey* generally received, and made, Payments on Account of the Partnership; and generally paid the Cash received on the Partnership Account into his own Banker's, who was not the Banker of the Partnership, on

(*a*) 1 *Rose*'s Bank. Ca. 437. S. C.

(1) 1 *Rose*'s Bank. Ca. 129. S. C.

his

his own Account; that *Aldrich* sometimes received Money on the Partnership Account; and generally paid what he so received into the Account of *Ramsey* at his Banker's; and occasionally both received Money on the Partnership Account without paying it into a Banker's. The Partnership had no Account with any other Bank than that appointed by the Deed. *Ramsey* paid in to the same Account with his own Banker all Money received on his separate Account; and made no distinction in his Drafts. *Aldrich* kept the Partnership Books; and the Banker's Book was always open to his Inspection. *Ramsey* generally communicated to him the Partnership Receipts and Payments; that he might make the Account. The Sum of £1082 was the Balance due from *Ramsey* at the Time of the Bankruptcy. Neither of the Bankrupts was aware until the Accounts were made up by an Accountant, that *Ramsey* had paid less than he received. The Certificate concluded by stating, that *Ramsey* did take the Sum of £1082 from the joint Estate, and not with the Privity, Contract, or subsequent Approbation, of *Aldrich*, or with the Intention to increase *Ramsey*'s separate Estate.

Mr. *Montagu*, in support of the Petition, argued, that all these Cases were considered by Lord *Thurlow* in the Bankruptcy of *Lodge* and *Fendal* (*a*); and the Rule was perfectly settled; the Commissioners having come to the Conclusion, that this Sum was taken from the joint Estate without the Privity of the Co-partner, and not by Contract, the legal Inference is, that it was taken by

(*a*) *Ex parte* the Assignees of *Lodge* and *Fendal*, 1 *Ves.* jun. 166. The Petition was afterwards dismissed by Lord *Thurlow*, as not amounting to a Case of Fraud. *Ex parte Batson*, 1 *Cooke*'s Bank. Law, 534, (Ed. 6. 561.) See *Ex parte Yonge*, *post*, Vol. 3. 31.

Fraud;

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HARRIS, *Ex parte.*

Fraud; being a Violation of the covenanted Rights of the other Partner.

Mr. *Cullen*, for the separate Creditors of *Ramsey*.

Lord *Hardwicke* in these Cases permitted Proof against the separate Estate upon the mere Fact of drawing out of the joint Fund. That however has since been held insufficient; and now the Money must appear to have been taken out in Fraud of the other Partner: but though the Want of Knowledge is *primâ facie* Evidence of Fraud, that is not a necessary Conclusion; and it is negatived by the Certificate of the Commissioners.

The Lord CHANCELLOR.

There has long been an End of the Law, which prevailed in the Time of Lord *Hardwicke*; whose Opinion appears to have been, that, if the joint Estate lent Money to the separate Estate of one Partner, or if one Partner lent to the joint Estate, Proof might be made by the one or the other in each Case (*a*). That has been put an End to, among other Principles, upon this certainly; that a Partner cannot come in Competition with separate Creditors of his own; nor as to the joint Estate with the joint Creditors. The Consequence is, that if one Partner lends £1000 to the Partnership, and they become insolvent in a Week, he cannot be a Creditor of the Partnership; though the Money was supplied to the joint Estate: so if the Partnership lends to an individual Partner, there can be no Proof for the joint against the separate Estate: that is, in each Case no Proof to affect the Creditors; though the individual Partners may certainly have the Right against each other.

(*a*) *Ex parte Hunter*, 1 *Cooke's* Bank. Law, 530, (Ed. 6. 587).

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The Opinion of Lord *Talbot* seems also to have been in Favour of this Proof *(a)*: but in and previously to the Year 1790 great Discussion took place at this Bar; the Result of which, according to Lord *Thurlow*'s Opinion, was expressed particularly in the Case of Dr. *Fendal* and *Lodge* (*b*). The former, a Physician, embarked a very large Property, his whole Fortune, in a Partnership with *Lodge*, whom he permitted to have the whole Management; and, a Bankruptcy ensuing, Lord *Thurlow* held, that, as it was with the Knowledge and Permission of *Fendal* that the whole Management of the Property was with *Lodge*, he was authorized to do, as he thought fit, with the Partnership Property; and *Fendal* therefore must abide the Consequences of what had been done most improperly, but under his own Authority, most imprudently given; and there could therefore be no Proof. The Law has been clear from that Time, that, to make out the Right to prove by the one Estate, or the other, it must be established, that the Effects, joint or separate, have been acquired by the one, or the other, improperly and fraudulently in this Sense, that they have been acquired under Circumstances, from which the Law implies Fraud: or in this Sense to increase the separate Estate of one Partner, that he meant fraudulently to increase his own Means out of the Partnership Estate. Lord *Thurlow* by "Fraud" intended to express what he thought necessary to distinguish that from taking by Contract, or Loan, or without the express or implied Authority of the other Partner; and that such Act would amount to Fraud.

(*a*) *Ex parte Blake*, 1 *Cooke*'s Bank. Law, 533, (Ed. 6. 560.) (1).

(*b*) *Ex parte* The Assignees of *Lodge* and *Fendal*, 1 *Ves.* jun. 166. *Ex parte Batson*, 1 *Cooke*'s Bank. Law, 534. (Ed. 6. 561).

(1) Cited by Name *Ex parte Drake*, 1 *Atk.* 225. See Lord *Craven* v. *Widdows*, 2 Ch. Ca. 139. 2 Ch. Rep. 117.

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Ex parte.

Upon this Case I formerly expressed my Opinion; and I now lay down, that, if in either the expressed or implied Terms of an Agreement for a Partnership there is a Prohibition of the Act, and it is done without the Knowledge, Consent, Privity, or subsequent Approbation, of the other Partner, before the Bankruptcy, and to the Intent to apply Partnership Funds to private Purposes, that is *primâ facie* a Fraud upon the Partnership. To illustrate this, I will put the simple Case of a Partnership between Two, and by the Articles all the Money is to be paid in to their joint Names at a particular Bank, and they are prohibited from drawing out more than £50 a Month each for individual Purposes; that during the Month of *January* they mutually observed those Articles by paying in, and on the first of *February* one, instead of £50, draws out £550; and upon the next Day a Bankruptcy happens; if it is made out, that this Over-drawing was for private Purposes, and without the Knowledge, Consent, Privity, or subsequent Approbation, of the other, as it was for private Purposes, and, therefore, must be for the Increase of the Individual's Estate, and as it was against the covenanted Rights, or rather the Prohibitions, affecting both, and without the Knowledge, Consent, Privity, or subsequent Approbation, of the Co-partner, it is as much a Fraud within Lord *Thurlow's* Rule, as if, according to the Expression I am informed I formerly used, he had stolen the Property. On the other Hand, in every Case all the Circumstances must be attended to: and, as there may be a Variation of Circumstances, so there necessarily must be in the Conclusion of Law. This Case, for Instance, upon the Circumstances, stated by the Report of the Commissioners, appears to require more Consideration, before I can say it falls within the Rule. All, that I can collect, is an Agreement, that whatever is received on the joint Account shall be paid into the Bankers in their joint Names: but it is admitted upon the Report, that no such Thing

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Thing was ever done: on the contrary *Aldrich* permitted all, that *Ramsey* received, to be paid into a Bank in the Name of *Ramsey* alone; and even what was received by *Aldrich* himself was paid in by him in *Ramsey's* Name. Then it is clear, that subsequent Conduct between Partners may raise a different Contract from the original Articles. Upon this Report nothing appears to have been ever paid in in the Name of both. I am then authorized to say, that *Aldrich* for some Reason so far thought it right to depart from the Stipulation, that he put the whole Funds of the Partnership in the Power of *Ramsey*. It appears, that the Money being in the Bank in the Name of *Ramsey* alone, is there throughout by the Authority of *Aldrich*; and by his Authority *Ramsey* alone draws. There is no Over-drawing stated by the Report. The utmost I can collect is, not Over-drawing, but Non-payment into the Bank: but how does that vary it? If *Ramsey* by the Authority of *Aldrich* paid in the whole, and therefore had the whole Dominion over it, is it material, that in one Case that Dominion was to be exercised by *Ramsey* over Money at the Bankers, in the other over Money in his own Hands, not paid in; but which, when paid in, would have admitted the same Application? This is much nearer the Case of *Lodge* and *Fendal* than any, that have occurred: the necessary Effect of the Transaction being to give the Dominion over the whole Fund to one; and the other must be taken to have consented to that Dominion.

Therefore, though the Non-application of this joint Property, according to the Articles, was without the Knowledge, Privity, Consent, and subsequent Approbation, of the Partner, yet the Facts, by reason and in consequence of which that Application was made, were with that Knowledge, Consent, &c. In this View of the Case upon the Facts stated there is great Difficulty in admitting

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Ex parte.

the Proof. If any Inquiry can be suggested, that can affect the Opinion I have expressed, I will not refuse it: but upon these Facts I think this within the Case of *Lodge* and *Fendal* (*a*).

(*a*) *Ex parte Yonge*, post. Vol. 3. 31.

1813,
Aug. 13.

MACHELL, *Ex parte* (1).

Proof of joint Debt under separate Commission, where there is no joint Estate.

Liability to Reparis of a Ship upon the registered Title; though without actual Notice; as if registered under a general Direction to an Agent to take an effectual Security.

THE House of *Williams* and *Wilcox*, of *Liverpool*, being indebted to their Bankers, *Devaynes* and Co. in the Year 1806, assigned a Moiety of three Ships, as a Security for the Debt; and a Registry was made in the joint Names of the two Houses. The Petitioners, in 1809, furnished Supplies for the Outfit of the Ships. In 1810, the House of *Devaynes* and Co. became Bankrupt; and soon afterwards *Williams* and *Wilcox*; having previously assigned their Shares to *Batson* and Co. The Ships having been sold, and the Produce divided between *Batson* and Co. and the Assignees under the Commission against *Devaynes* and Co. the Petition prayed that the Petitioners may be admitted to prove a Debt of £2319, for the Supplies furnished by them, under the Commission against *Devaynes* and Co.

Mr. *Hart*, and Mr. *Montagu*, in support of the Petition.

Sir *Samuel Romilly*, for the Assignees, resisted the Petition; contending, that the Bankrupts, having been registered as Owners without their Consent, were not liable.

(1) 1 *Rose's* B. Ca. 447.

The

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MACHELL, *Ex parte.*

The Lord CHANCELLOR.

These Houses stand upon the Face of the Registry as the Persons interested in the Ship; and, putting out of Consideration the Fact, that the Credit was given to *Williams* and Co. alone, *primâ facie* the Persons upon the Registry are liable. I take the Fact to be, that there is no joint Estate except these Shares of Ships. It is said, the Name of *Devaynes* and Co. was put upon the Registry without their Knowledge. It may be so; and yet it might be within their Knowledge, in a Sense, making them liable as Owners; as, if their Agent was directed to take an effectual Security, his Duty required him to have their Names upon the Registry; and if so, it would be very difficult to say, they had not Possession of the Ship: the Possession of some Owners being the Possession of all.

Possession of some Owners the Possession of all.

There is a Right therefore to make this Proof against the separate Estate of *Devaynes* and Co.: but I would not refuse an Issue, whether these Persons, or any of them, are liable with any other Persons, and whom, for the Repairs of the Ship. My Opinion is, that they are liable. Take the Order; with the Declaration, that it appears there is no joint Estate of the two Houses (*a*).

(*a*) See the Note, 16 *Ves.* 194, n. (*a*), to *Ex parte Taitt.* *Ex parte Jones. Ex parte Taylor*, 18 *Ves.* 283, 4.

CANHAM

1813, *June* 23.

CANHAM *v.* JONES.

No exclusive Right in a Subject, not protected by Patent, preventing Sale by another Person under the same Title, not assuming the Name and Character of the Plaintiff.

THE Bill stated, that *Isaac Swainson* deceased was for upwards of thirty Years before his Death the sole Proprietor of the Secret or Recipe for preparing the Medicine called *Velno*'s Vegetable Syrup; which he had purchased for £6000; and by his Will bequeathed to the Plaintiff; who since his Decease continued to make the same Preparation, as specified by the Recipe; and made great Profit; and would have made much greater, if the Defendant had not imposed on the Public a spurious Com position under the same Name.

The Bill farther stated, that the Defendant, having been a Servant of *Swainson*, was employed by him in the Preparation of the Syrup: but the complete Composition was never prepared by the Defendant; other essential Ingredients being introduced by *Swainson* himself in the Presence of the Plaintiff alone: the Secret or Recipe being known to no other Person; that the Defendant, being discharged from his Service, had made and advertised for Sale a spurious Preparation under the Name of *Velno*'s Vegetable Syrup; stated by him to be the same Medicine in Composition and Quality as that made by *Swainson* and the Plaintiff; the Defendant's Advertisement certifying, that the Medicine, prepared by him at his Residence under the Name of *Velno*'s Vegetable Syrup, is precisely the same with that made and sold by the late Mr. *Swainson*; and frequently by Advertisements and Hand-bills and also verbally using the Names of *Velno, Swainson,* and the Plaintiff, in various Ways, in order to recommend and

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promote the Sale of the said Medicine to the Prejudice of the Plaintiff.

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The Bill prayed an Account and Injunction, &c.

To this Bill the Defendant put in a general Demurrer for want of Equity.

Mr. *Leach*, and Mr. *Shadwell*, in support of the Demurrer.

The Purchase of this Recipe being stated in the Bill to have been made thirty Years ago, there is no Pretence for an exclusive Right against all the World. Had the Defendant really, as the Servant of *Swainson*, acquired a Knowledge of this Medicine, what was to prevent his using it? The Bill however states his to be a spurious Composition; if it is so, though an Imposition on the Public, it can give the Plaintiff no Right to an Account. The Bill is altogether destitute of Equity. An exclusive Right by Patent (*a*) is not asserted; and cannot be intended. The Jurisdiction must be founded on the Violation of a legal Right: but no such Right is stated; and there is no Instance of an Action on such a Case as this. In *Southern* v. *How*, stated in *Popham* (*b*), the Allegation was, that the Cloth sold was of an inferior Quality; not merely, that the Name was used. Fraud is the Ground of all those Cases. The Allegation of this Bill is not, that the Article was of inferior Quality: according to Dr. *Paley*, "spurious" meaning *different*, not *worse*.

Mr. *Hart*, and Mr. *Cowper*, for the Plaintiff.

(*a*) Stat. 21 *Jac.* 1. c 3. (*b*) *Poph.* 144.

Swainson

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Swainson acquired a Right to make Use of a particular Name; which once occupied, the exclusive Right is a necessary Consequence; as in the Instance of the Title of a Newspaper; and there is no Limit to it. The Allegation of this Bill amounts to Fraud; that the Defendant, having only a partial Knowledge of the Medicine, acquired as the confidential Servant of *Swainson*, represents falsely, that his is the same Composition; injuring the Plaintiff by injuring the Character of his Medicine; selling a spurious Composition by the same Name as that, to which the Plaintiff had acquired the exclusive Right. The Capacity to maintain an Action is not essential to this Jurisdiction; which stands upon false Representation, producing Injury, aggravated in this Instance by Breach of Trust. In *Sedon* v. *Senate*, about two Years since, the Defendant, having sold a Medicine to the Plaintiff, set up another under a similar Description; and in his Advertisement adopted Verses, which had been attached to the original Medicine. The *Master of the Rolls*, sitting for the *Lord Chancellor*, following *Hogg* v. *Kirby* (*a*), granted an Injunction though the Plaintiff had no Patent.

Mr. *Leach*, in Reply.

The Ground of all these Cases is, that Persons, meaning to deal with one Man, are by Fraud induced to deal with another; and those Authorities would have applied, if the Defendant had advertised his Warehouse as "*Canham*'s Warehouse for the Sale of *Velno*'s Vegetable Syrup:" but he merely represents, that he sells as good a Medicine under this Description as *Canham*, making no other Use of his Name than by entering into Competition with him.

(*a*) 8 *Ves.* 215.

The

The Vice-Chancellor. 1813.

Canham v. Jones.

This Bill proceeds upon an erroneous Notion of exclusive Property, now subsisting in this Medicine; which *Swainson*, having purchased, had a Right to dispose of by his Will; and, as it is contended, to give the Plaintiff the exclusive Right of Sale. If this Claim of Monopoly can be maintained, without any Limitation of Time, it is a much better Right than that of a Patentee: but the Violation of Right, with which the Defendant is charged, does not fall within the Cases, in which the Court has restrained a fraudulent Attempt by one Man to invade another's Property; to appropriate the Benefit of a valuable Interest, in the Nature of Good-will, consisting in the Character of his Trade or Production, established by individual Merit: the other representing himself to be the same Person, and his Trade or Production the same; as in *Hogg* v. *Kirby* (*a*); combining Imposition on the Public with Injury to the Individual.

This is not that Sort of Case. The Observation is correct, that the Bill, stating the Defendant's Medicine to be spurious, asserts it not to be the same as the Plaintiff's. The Defendant does not hold himself out as the Representative of *Swainson*, setting up a Right in that Character to the Medicine purchased by him; but merely represents, that he sells, not the Plaintiff's Medicine, but one of as good a Quality. He is perfectly at liberty to do so. If any exclusive Right in this Medicine ever existed, it has long expired.

The Foundation of this Bill therefore, the exclusive Right asserted by the Plaintiff, failing, all the consequential Relief falls with it; and the Demurrer must be allowed.

(*a*) 8 *Ves.* 215. See *Wilkins* v. *Aiken*, 17 *Ves.* 422.

CHALMERS

ROLLS.
1813,
March 15.

CHALMERS *v.* STORIL.

* General Disposition by Will not restrained by a defective Specification.

General Disposition of all the Testator's Estates real or personal to his Wife and two Children to be equally divided among them, subject to Annuities, on Death, to devolve to his Children equally; the Portion of the Wife upon her Death to his Children equally, upon their Deaths before her their Portion to her during Life, with a Limitation over upon the Death of all, without Issue of the Children: whether an Estate for Life or absolute to the Wife, *Quære.*

Widow put to Election between Dower and Interests under a Will; to be first ascertained.

ALEXANDER *Jekyll Chalmers* by his Will, dated in *October*, 1810, disposed as follows:

"I give to my dear Wife *Anna Maria Chalmers*, and "my two Children, namely, my Daughter *Anna Maria* "*Chalmers* and my Son *John Chalmers*, all my Estates "whatsoever, to be equally divided amongst them, whe- "ther real or personal, making no Distinction in Favor "of the Male, as it is my Intent, that my Daughter shall "have an equal Share with my Son of all my Property "after paying the following Legacies;" specifying two annual Sums to two Persons for Life, and at their Deaths to devolve to his Children equally. The Testator then specified the Property bequeathed by him as consisting of Freehold Ground Rents, Money on Mortgage, *American* Bank Stock, an Estate in *America*, &c. and proceeded thus:

"It is my further Will and Intention that in case of the "Death of my dear Wife *Anna Maria Chalmers* the "Portion or Part herein-before bequeathed her shall de- "scend to my two Children equally and in the Event of "both their Deaths before her that she shall enjoy during "her Life the Portion or Parts left or bequeathed by me "in this Instrument unto them and in the Event of the "Deaths of my said dear Wife and two Children (that is

"to

"to say, supposing my two Children now Infants die "without Issue it is my further Will that my Mother and "Sister *Francina* before mentioned should inherit after "them the whole of the said Properties during their "Lives, and at their Death that it should go in regular "Descent to the Children of my Sisters." The Testator appointed his Wife and the Defendant *Storil* his Executors.

The Bill, contending, that the Plaintiffs, the two infant Children, were entitled each to one full third Part of the clear Residue of the Testator's real and personal Estate, and that the Plaintiff, the Widow, was entitled to the other third for Life with Remainder to the two Children, in case they survived her, and that the Widow ought to be put to her Election as to her Right to Dower, prayed, that the Will may be established, &c.

Sir *Arthur Piggott*, and Mr. *Cullen*, for the Plaintiffs.

Sir *Samuel Romilly*, and Mr. *Johnson*; Mr. *Parker*, Mr. *Abercrombie*, Mr. *Horne*, Mr. *Roupell*, and Mr. *Treslove*, for the several Defendants.

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As to the Question, whether the whole personal Estate passes by the Will, my Opinion is, that it does. The Testator gives all his Estate whatsoever, whether real or personal, to be divided between his Wife and Children. The subsequent Enumeration of the Articles, of which he supposed his Property to consist, does not limit the Gift to the Particulars specified. Intending to give every Thing he could he has incorrectly stated what he had. In the Case of *Bridges* v. *Bridges*, cited by Mr.

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Roper (a) from *Viner*, the Words were more restrictive: "viz." being immediately added to the Gift of the Remainder of his Estate: but Lord *King*'s Opinion was, that the Words, following the "viz." did not restrain the preceding general Words; but were added by way of Enumeration or Description of the chief Particulars, whereof his Estate consisted: which Construction was strengthened by the Words immediately following, appointing his Son sole Executor; and, when the Testator disposed of the Remainder of his Estate, it was plain, that he did not intend to die intestate as to any Part of it.

Here the Testator disposes of the whole of his personal Estate; and therefore does not mean to die intestate as to any Part of it.

As to the Interest the Widow takes, whether absolute, or for Life only, upon the whole Will that is a very doubtful Question. With regard to the real Estate it is a mere legal Question; and, being doubtful, ought to receive the Decision of a Court of Law; and I shall suspend my Decision as to the personal Estate in the mean time.

As to her Right to Dower, whether she took under the Will an absolute Interest, or for Life only, it is a Case of Election; the Claim of Dower being directly inconsistent with the Disposition of the Will. The Testator directing all his real and personal Estate to be equally divided, &c. the same Equality is intended to take place in the Division of the real as of the personal Estate; which cannot be, if the Widow first takes out of it her Dower, and then a Third of the remaining Two-thirds. Farther, by describing his *English* Estates he excludes the Ambiguity,

(a) 2 *Rop.* 387. 8 *Vin.* Tit. Devise, 295. Pl. 13.

which

which Lord *Thurlow* in *Foster* v. *Cooke* (*a*) imputes to the Words "my Estate," as not necessarily extending to the Wife's Dower.

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General Expression "my Estate" in a Will not necessarily extending to Dower.

Here the Testator says, the Property thus bequeathed by him consists of these Particulars. It is therefore the Property itself, thus described, that is the Subject of the Devise; and not what might in Contemplation of Law be the Testator's Interest in that Property. This is therefore a Case of Election: but, before she can be compelled to elect, she is entitled to know what she has a Right to under the Will. As to the Estates out of this Kingdom, I cannot decide what she is entitled to in them.

A Case was directed.

(*a*) 3 *Bro.* C. C. 347.

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June 22. 30.
July 1.
1813,
Aug. 4.

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Marriage held to have been with Consent of a Trustee under a Will, though expressed, not absolutely, but in general Terms; that he would not stand in the Way of any Arrangement by the Co-Trustees, &c.; and advising a Settlement; having previously encouraged the Proposal; and, though Fraud was not imputed, having a Prospect of Benefit from the Forfeiture.

PETER Drinkwater by his Will, dated the 1st of *June*, 1801, after making a large Provision for his two Sons *Thomas* and *John*, gave to them and to his Son-in-law *John Pemberton Heywood* £20,000, upon Trust to place the same out at Interest, upon real or Government Securities, and pay and apply the Interest and Dividends, or so much thereof as they or the Survivors

(1) *Vide* on this Subject *Parnell* v. *Lyon*, Vol. I. *ante*, 479. *Goldsmid* v. *Goldsmid*, *Coop.* 225, and *Pollock* v. *Croft*, 1 *Merivale*, 181.

or

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or Survivor should think fit, for the Maintenance and Education of his Daughter *Eliza Drinkwater*; and, if she shall attain the Age of twenty-one Years, before she marries, then from the Time of her attaining such Age, until she shall marry, to pay to her for her own Use the Interest and Dividends of the said Sum of £20,000; and if his said Daughter shall happen to marry, whether before she attains the Age of twenty-one Years, or after, without the Consent in Writing of his said Trustees, or such of them as shall be then living, first had and obtained, then he gave the said Sum of £20,000 and the Interest thereof to his said Trustees, or such of them as shall be then living, to be by them, or such of them as shall be then living, settled and applied in such Manner for the separate Use and Benefit of his said Daughter and her Issue as to them, his said Trustees, or such of them as shall be then living, shall seem proper, without being in any Manner accountable to her or any Husband she may happen to marry respecting the same; and he declared that the same shall be in no respect subject to the Debts, Control, or Engagements, of any Husband his said Daughter shall so marry; and in case his Daughter shall never marry, then that his said Trustees shall pay to her the Interest, Dividends, and yearly Produce, of the said Sum of £20,000 during her Life; and at her Death shall dispose of the Principal in such Manner as she shall by her Will direct; or, if she makes no Will, then to her next of Kin, according to the Statute of Distributions; and if she shall marry without such Consent as aforesaid, and die in the Life-time of her Husband, then, upon her Death the said Sum of £20,000 shall in like Manner go to the next of Kin in Exclusion of such Husband; and if his said Daughter *Eliza* shall marry with the Consent of his Trustees first had and obtained in Writing, then that the Sum of £10,000, Part of the said Sum of £20,000, shall be paid to her, or the Stocks, Funds, or Securities, to that Amount shall be assigned

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signed to her, or, as she shall direct, upon such Marriage with Consent, and the remaining Sum of £10,000, the remainder of the said Sum of £20,000, shall be settled to her separate Use, and be at her own Disposal, without being subject to the Debts, Control, or Engagements, of her Husband.

The Testator gave to Trustees £10,000 for the Benefit of his Daughter *Margaret*, the Wife of *John Pemberton Heywood;* in order to make up with the £10,000 he had given her on her Marriage the Sum of £20,000 for her Portion; and appointed his two Sons (to whom he gave the Residue) and *Heywood*, Guardians of his Daughter *Eliza* during her Minority, and Executors.

Eliza Drinkwater, having attained twenty-one in *October* 1802, married in *December* 1809, *George Charles D'Aguilar;* and they filed the Bill against the Trustees; claiming her Fortune under the Will, as upon a Marriage with the Consent, required by the Testator, under these Circumstances.

In *September* 1809 Miss *Drinkwater* communicated to her Brothers Captain *D'Aguilar*'s Proposals; to whom *Heywood*, at whose House she then was, sent the following Letter: "Dear Sir, As I conclude you will have a "Journey over the Hills in Contemplation, I beg leave to "say, that I shall be very happy to see you at *Wakefield*. "4th *October*, 1809."

Captain *D'Aguilar* having accepted that Invitation, his Addresses were for some Time received without Objection: but at length a Difference arose upon a Proposal by the Trustees of a Settlement; and that Captain *D'Aguilar* should quit the Army. The Irritation, produced by this

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Difference, went to such an Extent, that the two Brothers declared their Resolution not to consent to the Match on any Terms: but the Distress of their Sister at this Declaration induced them afterwards, on the 14th *November*, to promise her to give their written Consent; protesting, that they did so most reluctantly, and only in consideration of her Sufferings; apprehending her Life to be in Danger; and they stated, that they had written to *Heywood* accordingly.

The Answer to that Communication was by a Letter from *Heywood* to *John Drinkwater*, dated the 15th of *November*, containing the following Passages:—" I can " only repeat what I have already said, that I will never " stand in the Way of any Arrangement *Tom* and you " think right with respect to *Eliza*'s Concerns. You do " not sufficiently state what you have agreed to more than " that you are to give your written Consent to the Mar- " riage. I presume there is to be some Settlement; be- " cause, if she marries with our general unqualified Con- " sent, he will get the whole of her Fortune: £10,000 in " her own Right, and the other £10,000 she may give " him the Day after the Marriage. I suppose it is the In- " terest of the £10,000 that he is to have, as he proposed " here. I mention these Things not with any View of " raising Objections, or as meaning at all to differ from " you, but that the Thing may be fully understood, so " that there may be no Disputes hereafter."

After noticing, as an Object of Captain *D'Aguilar*, the Settlement of £500 a Year on him for Life, the Letter proceeds thus:—" We hear he is to join his Regiment in " *December*: if so, and the Marriage is to take place be- " fore he goes, there cannot be much Time to lose. I " should wish to see the Settlement, before it is engrossed; " as I feel it is a Sort of Duty to take care, that what is " done,

"done, is done properly. The Mode of giving our Con-"sent in Writing is by signing the Settlement; and not "by giving a general unqualified Consent: as by your Let-"ter you seem inclined to do. If all, that is asked, is the "£500 a Year, the shortest and least expensive Method "of settling would be to let the Marriage take place with-"out any formal Consent, and let us sign an Undertaking "to allow him £500 a Year for Life, in the Event of her "dying in his Life-time without Children: but perhaps it "will be more satisfactory to *Eliza* to have it done by a "formal Settlement made with Consent."

Thomas and *John Drinkwater* by separate Letters, dated the 3d of *December*, the one to his Sister, the other to Captain *D'Aguilar*, expressed a formal Consent to their Marriage; declaring, that it was given in consequence of a Promise extorted against their Judgment and a Sense of Duty, from an Apprehension, that her Life was in Danger. On the 8th of *December* the Plaintiffs were married; having by Articles settled £10,000, Part of the £20,000; giving Captain *D'Aguilar*, in case he should survive his Wife, the Interest for Life. *Heywood*, who had in Conversation admitted, that Things had gone too far for either Party to retract, himself appointed the Day for the Marriage; and brought his Wife to attend her Sister. By his Answer he insisted, that his Letter of the 15th of *November* was intended, not as an unqualified, but only as a conditional, Consent.

Sir *Samuel Romilly*, Mr. *Leach*, and Mr. *Horne*, for the Plaintiffs.

All the Authorities, applicable to the Question in this Cause, are collected in *Dashwood* v. *Lord Bulkeley* (*a*);

(*a*) 10 *Ves.* 230.

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and were again much considered by the *Lord Chancellor*, in a more recent Case, *Clarke* v. *Parker* (*a*). The Result is, that, where Consent to Marriage is required, no precise Form is necessary. If the Consent is directed to be in Writing, it must, generally speaking, be in Writing; that is, a parol Consent will not be sufficient: but no precise Form is required: one may delegate his Authority to the others; and Consent, whether by Parol or Writing, if withheld on unreasonable Grounds, is dispensed with in Equity. Under the Marriage Act (*b*) Acquiescence and general Encouragement of Addresses have been held sufficient to constitute Consent; not to be retracted without some special Ground afterwards discovered. Here is Consent in each Mode: by Writing, and by Encouragement of the Addresses. The first Letter of *Heywood*, considering the Circumstances, and the Purpose, for which he invited the Plaintiff to his House, would alone be an implied Consent in Writing: but his subsequent Letter of the 15th of *November* is an express Admission, that he delegated his Authority to the Brothers; who gave a formal Consent in Writing. If the Plaintiff was justified in refusing to accede to what *Heywood* suggested in that Letter, this is precisely the Case of *Lord Strange* v. *Smith* (*c*). What Right had *Heywood* to interfere as to her Fortune: to insist, that she should not have either the one or the other Sum of £10,000 in the Manner proposed by her Father; but that the Whole should be settled upon her next of Kin, his Wife being one; excluding her Husband, if there should be no Children? The Testator has himself prescribed the Arrangement of her Fortune in Terms excluding all Interposition of the Trustees. This Case has the Peculiarity, that Consent is limited to mere Approbation of the Person; not including any Power to

(*a*) This Case will be reported, 19 *Ves.*

(*b*) Stat. 26 *Geo.* 2. c. 33.

(*c*) *Amb.* 263.

stipulate

stipulate for a Settlement: a Discretion in other Cases, which could hardly be considered as exercised by a simple Acquiescence in the first Address.

A stronger Case than *Daley* v. *Desbouverie* (a) cannot be stated: a Letter, saying merely "we shall be obliged "to consent," was held an actual Consent in Writing. *Mesgrett* v. *Mesgrett* (b) applies also in this Respect; that the Person, whose Consent was required, would derive Benefit from a Marriage without Consent; and, though in this Instance certainly no improper Motive is imputed, the Court will view with great Jealousy a Refusal, and with much more a Retraction, of Consent under such Circumstances.

Mr. *Richards*, for the Defendant *Heywood*: Mr. *Hart*, and Mr. *Ainslie*, for the other Trustees.

Here is no Consent, such as the Will requires; and the Court has no Jurisdiction to supply that Consent. The first Letter of *Heywood* is a mere general Invitation; without, as it appears, even a Knowledge of any Attachment. The second Letter, if it can be considered a Consent, is not a general, unqualified, Consent within the Meaning of the Will; importing a Condition; advising his Brothers-in-law as to their Conduct; and stipulating at least for a proper Settlement. It cannot be maintained, that a Trustee, having this Discretion under the Will of a Parent to give or withhold Consent to the Marriage of his Child, was not bound in the due Execution of that Trust to see, upon what Foundation his Consent was required; and upon the

(a) 2 *Atk.* 261; cited 2 *Ves.* 535.

(b) 2 *Vern.* 580. 1 Eq. Ca. Abr. 111. Pl. 7.

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Proposal of an Officer, having no Provision to offer, to make a Settlement the Condition of his Consent. Such an Authority could not be delegated: nor did the *Lord Chancellor* hold, that it might; however anxious in *Dashwood* v. *Lord Bulkeley* and *Clarke* v. *Parker* to prevent a Forfeiture; and with that View inquiring, whether the particular Trustee had such Communication with the others as would bind him. The Plaintiff was so far from conceiving, that he had the Consent of the Trustees, that for a Time he abandoned all Thoughts of the Marriage; saying, the Thing was over. The Authority of *Daley* v. *Desbouverie* is much weakened by the *Lord Chancellor's* Observations in *Dashwood* v. *Lord Bulkeley*.

Sir *Samuel Romilly*, in Reply.

The Effect of the Evidence as to the Plaintiff's Abandonment is much misunderstood. Those Expressions did not arise from his Conviction, that he had not the Consent of the Trustees; but were the Consequence of a Letter from Mrs. *D'Aguilar*; who at that Time was deluded into a Persuasion, that his Views were mercenary. There is no Reason to conclude, that the *Lord Chancellor*, though certainly expressing some Doubt upon the Principle of Lord *Hardwicke's* Decision in *Daley* v. *Desbouverie*, intended to over-rule that Case; to which Lord *Hardwicke* refers in *Lord Strange* v. *Smith*; and the *Lord Chancellor* observes, that Lord *Hardwicke's* Notes confirm the Report. The Decision of *Dashwood* v. *Lord Bulkeley*, upon Circumstances perfectly different, certainly does not affect it. The clear Result of all the Authorities establishes the two Propositions, which must determine this Case; that the particular Form of Consent is not essential; and that Consent, once given, cannot without Reason be withdrawn; especially if the Person, so withdrawing his Consent, would derive a Benefit from a Marriage without Consent.

In

In that respect this Case cannot be distinguished from *Mesgrett* v. *Mesgrett*, except that here is no Imputation of Fraud against *Heywood*; who however acquiesced in the Plaintiff's Addresses, until their Affections were engaged; and, when this Union became essential to her Health, attempts to withdraw his Approbation; and his Wife may have a Benefit by the Forfeiture. A conditional Consent becomes absolute, when the Condition is performed. The Letter of the 15th *November* admits only this Construction; that, if they give their Consent, he will make no Objection; though he thinks the proper Course is to have a Settlement executed. After that the most formal Consent was given by the Brothers: *Heywood* himself fixed the Day; and the Marriage took place on that Day. These Circumstances go far beyond *Daley* v. *Desbouverie*; and meet all the Difficulty the *Lord Chancellor* felt upon that Case.

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The Question in this Case is, whether the Marriage of the Plaintiffs is to be considered as a Marriage with the Consent of the three Trustees, named in the Will of Mrs. *D'Aguilar's* Father. It appears, that in *September*, 1809, Miss *Drinkwater*, now Mrs. *D'Aguilar*, had informed her Brothers *John* and *Thomas Drinkwater*, two of the Trustees, that Captain *D'Aguilar* was paying his Addresses to her: a Communication they understood to be made for the Purpose of learning their Opinion with respect to the Propriety of receiving such Addresses. In their Answers, which are in Evidence, there is at least nothing of Discouragement or Dissuasion. On the 4th of *October* Mr. *Heywood*, the third Trustee, who was married to a Sister of Miss *Drinkwater's*, wrote to Captain *D'Aguilar* the Note, which is in Evidence; inviting him to *Wakefield*, where

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where Miss *Drinkwater* was then residing at Mr. *Heywood's* House. Her Brothers' Letters are directed to her there. Captain *D'Aguilar* went accordingly. The Effect, if not the Object, of such an Invitation must have been to afford to Captain *D'Aguilar* and Miss *Drinkwater* frequent Opportunities of Intercourse. It appears, that before the End of the Month a mutual Attachment was understood in the Family to have been formed. From the Beginning it was known, that Captain *D'Aguilar* was in the Army: a Circumstance, that had not, as far as appears, drawn from any of the Trustees an Expression of Dissent, or even of Caution; and now, if Miss *Drinkwater* was ready to contend with the Disadvantages of being a Soldier's Wife, and under the Impression, that she was, *Thomas Drinkwater*, speaking for himself and his Brother, says, they conceived themselves justified in giving their Acquiescence.

After a mutual Attachment had been suffered to grow up under the Sanction of the Trustees, it would be somewhat late to state Terms and Conditions, on which a Marriage between the Parties should take place; as they must either have done Violence to their Affections, or have submitted to any Terms, however arbitrary or unreasonable, that the Trustees might choose to dictate: but none were even now intimated. The Acquiescence of the Brothers had no Reference to any particular Mode of settling Miss *Drinkwater's* Fortune. This was probably deemed the less necessary, as the Father's Will had in Effect settled it by providing, that, the whole of it should in case of her marrying without Consent be settled and applied for the separate Use and Benefit of his Daughter in such Manner as his Trustees should think proper; and if she married with Consent, that one Half of it, viz. £10,000, should be settled to her separate Use; and the other Half be paid to herself

herself (which of Course would give it to her Husband) upon such Marriage with Consent.

A Settlement however was afterwards proposed by the Trustees; and it was also proposed, that Captain *D'Aguilar* should quit the Army. Upon these Points a Difference arose; which produced considerable Irritation on both Sides. The Brothers became violently averse to the Match; and declared their Resolution not to consent to it on any Terms. This Declaration having thrown their Sister into a State of great Agitation and Distress, they relented; and on the 15th or 16th of *November* promised her to give their written Consent: protesting at the same Time, that they did so most reluctantly, and only in Consideration of their Sister's Sufferings, whose Life they apprehended to be in Danger. They professed to waive all Discussion as to Settlement. They said, they had written to Mr. *Heywood;* from whom there had not been Time to receive an Answer: but that on their leaving *Wakefield* he had assured them, that he should be regulated by them; and would consent to whatever they consented to.

Upon his Answer to their Communication a great deal of the Argument has hinged. On the one Side it is said to be merely a conditional Consent, in case Captain *D'Aguilar* should execute such a Settlement as Mr. *Heywood* should approve: on the other it is contended, that the Effect of it is to give his Consent, in case the Brothers should think fit to give theirs. I cannot help being of Opinion, that the last is its true Construction; for although there is a Variety of Presumptions, and Suppositions, and Proposals, and Suggestions, scattered through it, yet they must all be understood to be made, as he himself declares they are made, not for the Purpose of raising Objections, or at all differing from the Brothers, or standing in the Way

of

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of any Arrangement they might think right; but only that Things might be fully understood. If, after Things were by Means of this Letter fully understood, the Brothers thought proper to give their Consent without requiring any such Settlement as the Letter suggested, surely he in withholding his Consent from the Want of such Settlement would be differing from them; would be raising a most decisive Objection; and would be standing in the Way of an Arrangement, to which they on the whole View of the Case had judged it right to accede. All such Difference, all such Objection, and all such Obstruction, he had expressly disclaimed. It seems to me to come to the same Thing as if he said in fewer Words and plainer Terms, "If you consent I consent." When therefore they on the 3d of *December* did give their formal written Consent, I conceive, that his was virtually included in theirs. To contend, that it was not, is the more extraordinary, as it appears, he was actually consenting to the Marriage: his Opinion being that it was under all the Circumstances fit, that it should take place. He, as well as *Thomas Drinkwater*, assented to the Observation, made by the Witness Mr. *Lawrence*, that Things had gone too far for either Party to retract with Honor. He himself fixed the Day for the Celebration of the Marriage; and he brought his Wife to *Irwell* for the professed Purpose of attending her Sister to Church. Is it meant to say, that, though he was consenting to the Marriage, he was not consenting to the Terms, on which it was to take place? Consent to the Marriage is the Point in Issue. The Consequences are fixed by the Father's Will. How is it material, that on consenting to the Marriage he regretted, that the Father's Disposition should take Effect?

The Reluctance of the Brothers continued to the last. They gave their written Consent grudgingly, and only because

cause they had promised to give it: but I cannot therefore hold, that the Marriage was without their Consent in Writing. I must say, I am quite at a Loss to discover from the Evidence any solid Ground for this Reluctance. There are but two Reasons for it suggested: the Profession of Captain *D'Aguilar*, and his alleged mercenary Motives. As to the former, it was, as I have already said, known from the Beginning; and, if it was deemed an Objection, that Objection ought to have been made at the earliest possible Moment. It was a strange Thing to suffer their Sister without one Word of Disapprobation to receive the Addresses of a Soldier, and then tell her, she must not think of marrying him, because he was a Soldier. The other was a much more serious Ground of Objection: but I think the Conclusion, as to Captain *D'Aguilar*'s mercenary Motives, was drawn from very insufficient Premises. It never appears to have been expected, that he should bring any Thing into Settlement. He could have no Interest in wishing a Settlement of Miss *Drinkwater*'s Fortune to be made. The Father's Will was as good a Settlement as he could desire: but if there was to be a Settlement, he proposed, that, in case he survived his Wife, he should have the Interest during Life of that Sum of £10,000, which the Will had in Effect said should belong absolutely to any such Husband as the Trustees should approve. Surely this was no such extravagant Proposal as to warrant an Inference, that the Person making it could, in desiring the projected Union, be influenced by nothing but mean and mercenary Motives. It is very rare to see a Settlement of a Wife's Fortune, in which a less Interest is given to a Husband; and it is all the Interest, which Captain *D'Aguilar* has taken under the Settlement, which he himself voluntarily executed without the Concurrence of the Trustees.

After

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After a temporary Estrangement, produced by the Impression, which Mr. *Heywood's* Letter had made upon Miss *Drinkwater's* Mind, it was resolved between her and Captain *D'Aguilar*, that the Marriage should take place, whether the Consent of the Trustees should or should not be obtained: a Resolution, which on the Part of Captain *D'Aguilar* furnished a sufficient Answer to the Imputation of mercenary Motives. In a Letter, addressed to each of the Brothers, dated the 2d of *December*, Captain *D'Aguilar*, after referring to their previous Promise, says, "I am perfectly aware, that without the "Consent of the three Trustees I can have no Claim "whatever upon your Sister's Fortune: but I must decline "the Compromise, offered by Mr. *Heywood* Yesterday "Morning; and, if he still persists, after you have given "your Consent, I have only to say, that I shall waive all "Discussion of the Business; and be most happy to "marry your Sister on the Day, fixed between us."

From this Letter it was argued, that Captain *D'Aguilar* did not conceive himself to have Mr. *Heywood's* Consent; although he now insists he had it. That, I think, is perfectly immaterial. Whether Captain *D'Aguilar* had never seen Mr. *Heywood's* Letter, or did not construe it, as I do, I do not know. The Question is, not as to what he thought, or believed, but as to what actually existed. In *Campbell* v. *Lord Netterville*, which is shortly stated in 2 *Ves.* (*a*), it appears from the Cases in the House of Lords, that the Parties were at the Time of the first Marriage quite ignorant of most of the Circumstances, which were held to amount to a constructive Consent on the Part of the Father: so much so, that, instead of insisting on it as a Marriage, by Consent, they had refused

(*a*) 2 *Ves.* 534.

to

to answer any of the Inquiries of the Bill; as tending to subject them to a Forfeiture of the Wife's Fortune. Advantage was taken of that Silence in the Appellant's Case: where it is said, that it is inconsistent with the Answer and Marriage Articles and the subsequent Marriage, &c. It is accounted for by the Respondent in this Manner; that they were not then so fully informed, as they were afterwards from the Course of the Evidence, of the several Steps taken before hand by *Burton* to forward the Marriage; as by the cross Examination and other Evidence appeared.

Upon the whole my Opinion is, that this Marriage must be considered as having been had with the Consent in Writing of the three Trustees; and therefore it is unnecessary to consider, how far it would have fallen within the Principle of *Campbell* v. *Lord Netterville*, and *Lord Strange* v. *Smith* (*a*), if such direct Consent had been wanting.

The Decree (*b*) declared the Marriage of the Plaintiff *Eliza D'Aguilar* to be a Marriage duly had with the Consent in Writing of the three Trustees under the Will: and that the Sum of £10,000, being one Moiety of her Fortune, ought to be settled in the Manner prescribed by the Will in that Event; and that the remaining £10,000 ought to be settled according to the Articles, made previous to the Marriage of the Plaintiffs, &c.

(*a*) *Amb.* 263. (*b*) Reg. Lib. A. 1812. Fo. 1592.

HEATH,

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HEATH, *Ex parte.*

Distinction as to the Necessity of Notice to the Drawer of a dishonoured Bill; depending on the Fact, whether the Acceptor has Effects; or, whether it is, if a single Transaction, or, if various Dealings, the Excess, for the Accommodation of the Drawer or Acceptor. In the latter Case Notice equally necessary without Effects.

Whether Securities, as Title Deeds, and short Bills, are not Effects for this Purpose, *Quære.*

THE Petitioner was the Indorsee of a Bill of Exchange for £1621 : 11*s.*; drawn upon, and accepted by, *Rowlandson* and Co.; which the Petitioner had discounted for *Bedford*, the Drawer. The Bill, when due, on the 20th of *July*, 1810, was dishonoured; the Acceptors having stopped Payment on the 14th; of which the Petition alleged that *Bedford* had due Notice. A Commission of Bankruptcy issued against *Rowlandson* and Co. on the 20th of *August*; under which the Petitioner proved his Debt, and before any Dividend, *Bedford* having also become a Bankrupt, this Petition was presented: stating, that the Petitioner was by the Neglect of his Agent in not sending his Affirmation, deprived of the Opportunity, of proving under the Commission against *Bedford*; under which a Dividend of 7*s.* in the Pound had been declared; and, praying, that the Petitioner may be admitted to prove, and receive the Dividend.

Sir *Samuel Romilly*, and Mr. *Bell*, for the Assignees, opposed the Petition; insisting, that the Result of the Transactions between these Parties was Accommodation to the Acceptors; and controverting the Fact of Notice.

The Lord CHANCELLOR.

I have often lamented the Consequences of the Distinction, introduced in modern Times, as to the Necessity of giving Notice of the Non-payment or Non-acceptance of

of a Bill of Exchange, whether the Acceptor had or had not Effects; and I have the Satisfaction of finding, that my Opinion has been adopted by the Courts of Law. According to the old Rule a Bill of Exchange purporting upon the Face of it to be for Value received, the Implication of Law from the Acceptance was, that the Acceptor had Effects. Then they came to this general Doctrine, that it is not necessary for the Holder to give Notice, if he can shew, that the Acceptor had no Effects. The first Objection is, who is to decide, whether there are Effects, or not? In the simple Case, where there is nothing but that particular Bill, and no other Dealing between them, there is no Difficulty: but, if there are complicated Engagements, and various Accommodation Transactions, no one can say, whether there are Effects, or not; and there cannot be a stronger Instance than that in the Case (a) referred to, in which Lord Chief Justice *Eyre*, a very good Lawyer, left it to the Jury to decide without any Solution of the Question, whether Title Deeds are Effects: but a Rule, that Securities cannot be Effects in any Case would be quite destructive of all commercial Dealing. Are not short Bills, for Instance, Effects? Is it of no Importance to the Holder to have Notice; that he may withdraw them from the Possession of the Acceptor?

1813. HEATH, *Ex parte.*

The Courts were obliged necessarily to decide, that, if Bills were accepted for the Accommodation of the Drawer, and there was nothing but that Paper between them, Notice was not necessary; the Drawer being, as between him and the Acceptor, first liable: but, if Bills were drawn for the Accommodation of the Acceptor, the Transaction being for his Benefit, there must be Notice without Effects; and if in the Result of various Dealings the Surplus of

(a) *Wallwyn* v. *St. Quintin*, 2 *Esp.* N. P. Cas. 515.

1813. HEATH, *Ex parte.*

Accommodation is on the Side of the Acceptor, he is with regard to the Drawer exactly in the Situation of an Acceptor, having Effects; and the Failure to give Notice may be equally detrimental.

I will in this Instance give an Inquiry. It is upon the Petitioner to prove, that in all this Complication there is nothing, which the Law calls Effects. He may therefore have Liberty to call a Meeting: and must pay the Costs of this Application.

YOUNG, *Ex parte* (1).

1813, *Aug.* 13. 19.

Part Owners of a Ship are Tenants in Common, not joint Tenants. No Lien therefore on the Share of one, a Bankrupt having been also managing Owner, for Outfit, Freight, &c. due to the others.

THE Petitioners were part Owners of a Ship, called the *Grenville Bay*, with other Persons; two of whom, *William Lushington*, senior and junior, became Bankrupts on the 6th of *January*, 1812. The Bankrupts were also the managing Owners; and in that Character were indebted to the Petitioners and the other Owners £287 on Balance of Accounts for the Freight and Earnings of the Ship, after taking Credit for the Outfit, amounting to £2234; which Sum the Bankrupts had not paid; and after the Bankruptcy the other Owners were obliged to pay it. The Assignees sold the Share of the Bankrupts for £780.

The Petition prayed an Application of the Proceeds of the Share of the Bankrupts in the Ship, Freight, &c. towards Satisfaction of the Sums so due to the Petitioners and the other Owners.

(1) 2 *Rose's* Bkpt. Ca. 78, *in note.*

Sir

1813.
YOUNG, *Ex parte.*

Sir *Samuel Romilly*, and Mr. *Montague*, in support of the Petition, said, this Petition was presented by part Owners of a Ship, contending, that, though Tenants in Common, they are to be considered as joint Owners; and upon Bankruptcy the Distribution is to be as of joint Property, to be applied first to the joint Debts, according to *Doddington* v. *Hallet* (a); especially as the Bankrupts had been intrusted as the managing Owners.

Sir *Arthur Piggott*, for the Assignees, resisted the Petition, as in Opposition to the universal Understanding, that part Owners of a Ship are not Partners: *Doddington* v. *Hallet* being a single Case, and never acted upon.

The Lord CHANCELLOR.

The Difficulty in this Case arises upon the Decision of *Doddington* v. *Hallet* by Lord *Hardwicke*; which is directly in Point. That Case is questioned by Mr. *Abbott* (b); who doubts, what would be done with it at this Day; and I adopt that Doubt. The Case, which is given by Mr. *Abbott* from the Register's Book, is a clear Decision by Lord *Hardwicke*, that part Owners of a Ship, being Tenants in Common, and not joint Tenants, have a Right notwithstanding to consider that as a Chattel, used in Partnership, and liable, as Partnership Effects, to pay all Debts whatever, to which any of them are liable on Account of the Ship. His Opinion went the length, that the Tenant in Common had a Right to a Sale. There is great Difficulty upon that Case; and the Inclination of my Judgment is against it: but it would be a very strong Act for me by an Order in Bankruptcy, from which there is no Appeal, to reverse a Decree, made by Lord *Hardwicke*

(a) 1 *Ves.* 497. (b) *Abb.* Ship. 99.

1813. YOUNG, *Ex parte.*

in a Cause. From a Manuscript Note I know, it was his most solemn and deliberate Opinion after great Consideration, that the contrary could not be maintained; and there is no Decision in Equity contradicting that.

Aug. 19.

The Lord CHANCELLOR said, that, after great Consideration, he must decide against the Case of *Doddington* v. *Hallet.*

1813, *Aug.* 19, 20.

OLIVER, *Ex parte* (*a*).

Jurisdiction of the Commissioners to commit, and of the Court on *Habeas Corpus* to discharge, a Bankrupt; depending on the Point, whether the Answer, though positively sworn, is satisfactory.

The Court cannot go out of the Return to the Writ.

The Bankrupt not bound to answer any Question, that has a Tendency to accuse him of a criminal Act; but is liable to Commitment; if on that Account his Answer is unsatisfactory: that his Answer tends to criminate another is no Objection.

In this Instance the Answer not being satisfactory he was not discharged: but the Commissioners were recommended by the *Lord Chancellor* to proceed to examine him farther.

THIS Petition, presented by a Bankrupt under Commitment by the Commissioners, stated, that the Petitioner had communicated to his Assignees an Imprudence, of which he had been guilty, in paying a Sum of £400 to a Man, who had discovered a Connection between the Petitioner and another Person's Wife, in order to stop an Action, and prevent an Exposure of the Petitioner to his Family and the World; and had requested his Assignees not unnecessarily to ask him any Questions upon that Subject; as it would expose him without Benefit to his Creditors: that, the Assignees being prejudiced against him, his Exa-

(*a*) 1 *Rose*, 40

that,

mination had been confined to that single Transaction; upon which he was committed; and, being afterwards at his own Request brought up from *Newgate*, was remanded; and he is unable to make any farther Discovery as to the £400.

The Petition prayed a Direction to the Commissioners to appoint a Day for the Examination of the Petitioner's Accounts, &c.; and that he may in the mean Time be discharged.

When this Petition was mentioned, the *Lord Chancellor* directed the Writ of *Habeas Corpus* to issue. The Return to the Writ set forth the Warrant of Commitment; containing at Length the Examination of the Bankrupt, relative to the Payment of the Sum of £400, referred to by the Petition. To the Question, what is the Name of the Person, to whom he had stated, that he had paid that Sum, £200 in *October*, and the remaining £200 after his Return from the Country, his Answer was in Substance as follows:

" I do not know his Name. I have seen him twice since " I paid the last £200. He is a tall Man; wears Black; " and uses Spectacles. I met him by Appointment at " the Corner of *Newgate Street*. The first Time I saw " him he followed me from a House in the Neighbour- " hood of *Ludgate Hill* home; and spoke to me late in " the Evening in my Coffee-room at *Dolly*'s; stating, that " he knew the Lady he had seen with me; and, unless I " made him a handsome Compliment, he would give In- " formation to the Husband. He first asked £500; or he " would expose me to my Family; and cause an Action " to be brought against me. I told him I would meet

1813. OLIVER, *Ex parte.*

"him the next Evening at the *Plough* at *Smithfield.* "The Place was named by him. I met him the next "Evening; but did not in the mean Time consult any "one on the Subject. He agreed to take £400; £200 "to be paid in a Fortnight from that Time (*September*), "and £200 before *Christmas.* I took no Receipt or "Memorandum. I paid him in Bank Notes: one for "£100; which I received from Mr. *G*——. I was to "meet the Person, and did meet him, about a Fortnight "afterwards at the *Plough*; and paid him the first £200. "He applied to me several Times by Note without any "Name for Payment of the remaining £200. The "Notes were sent by a Boy: all by the same Boy. I do "not know the Boy's Name; but should know him, if I "saw him. He did not wait for any Answer: but I went "to the Person at the *Plough*; where the Note stated "he was waiting for me."

Upon a subsequent Meeting he stated, that he does not know the Name of that Person; and cannot tell where he lives, or is to be found; that he has not any of the Notes, stated to have been received from him; and has no farther Explanation to give, except that since the last Meeting he had called at the *Plough*; and described the Person; requesting, that, if he should come again, they would follow him home; and ascertain, who he was, and his Residence; promising to pay for it; that the Charge against him was for having been with the Wife of another Man, in an inferior Situation of Life; that he thought the Man who made the Charge, had an Opportunity of knowing, that it was true; having been informed by the Servant of the House, that, when the Woman alluded to went out, a Man followed her, whom he suspected to be the Person; that he could not state any Person, to whom he

he had related the Transaction before his Bankruptcy; and he did not name it to the Woman herself.

1813.

OLIVER,
Ex parte.

Upon the Return to the Writ a Motion was made, that the Bankrupt should be discharged.

Sir *Samuel Romilly*, and Mr. *Cullen*, in support of the Motion.

The Account given by the Bankrupt of the Transaction, if improbable, may be true; and the Consequence of refusing this Application will be Imprisonment for the Remainder of his Life. Indiscreet as such Conduct may be, these Transactions, giving Money to an unknown Person, to prevent Exposure, occur every Day. It was formerly held (*a*), that, if the Bankrupt swore positively to a Fact, however improbable, the Commissioners must be satisfied; and, though since the late Cases of *Taylor* (*b*) and *Nowlan* (*c*) that cannot be maintained, there is no Instance of committing upon the Assertion or Denial of a single Fact without other Circumstances. This is very different from *Nowlan*'s Case; who represented, that his whole Property was lost.

Mr. *Leach*, and Mr. *Montague*, for the Assignees.

The Question, since the late Cases of *Taylor* and *Nowlan* is, whether the Bankrupt can evade giving the Account by an improbable Fiction: that renders all other Account fruitless; whether the Commissioners are to be satisfied (which is the Expression in the Act) with any Story, the most improbable, which he may have the Hardiness to

(*a*) *Pedley*'s Case, *Leach*, 365.

(*b*) 8 *Ves.* 328.

(*c*) 11 *Ves.* 511.

give

1813. OLIVER, *Ex parte.*

give them; as it would go to this Extent; that, if he swore, he had wantonly thrown his Pocket-book over the Rails of *St. Paul's Church-yard*, there is an End of the Examination. The true Question in this Stage is, whether any Court, before whom this Commitment is brought, can say, that this is not a mere Fiction, to avoid an Account; and can be quite sure, that it did not appear most improbable in the Judgment of those, who had the best Means of examining its Truth. The Statement, that a Sum of this Amount was paid by a Person in this Rank of Life on such an Account, is highly improbable.

Sir *Samuel Romilly*, in Reply, distinguished this Account from a Story so grossly improbable as *Nowlan's*, or that, which had been put; observing, that the Effect of this Threat upon the Petitioner's Feelings could not be determined by his Rank in Life.

The Lord CHANCELLOR.

This Case brings before me an Application very unusual in this Court; as, though the Writ of *Habeas Corpus* unquestionably is demandable of Right from the *Lord Chancellor*, yet it happens in Fact, that an Application to him for that Purpose except in Cases in his own Court for the ordinary Purpose of Commitment, or of changing the Custody, very seldom comes before him.

This Application was made originally, not by *Habeas Corpus*, but on a Petition: praying, that I would direct the Commissioners to proceed farther in the Examination; and 2dly, That I would discharge the Bankrupt in the mean Time. With regard to the first Object of that Petition, as to proceeding farther in the Examination, I thought, when this was formerly before me, and that Opinion remains

1813.

OLIVER, *Ex parte.*

mains now, when I have seen the Return, that the Commissioners ought to proceed farther. As to the other Object, the Discharge in the mean Time, I shall, as I did in *Nowlan*'s Case (*a*), take a few Hours for Consideration; remanding the Bankrupt until twelve o'Clock To-morrow.

The Question as to the Nature of the Jurisdiction, when the Party is brought before the Court by *Habeas Corpus*, which seems to rest chiefly upon my own Judgment in *Taylor*'s (*b*) and *Nowlan*'s Cases, must be considered with a very anxious Attention to the View of the Legislature, the Situation of the Commissioners, the Party, who is the Subject of this Jurisdiction, and the Duty, imposed upon the Court, before whom he is brought. The Language of the Act of Parliament imposes upon the Commissioners a Duty, from which they ought to be relieved, if the Difficulty of performing it is as great, as it appears to me to be. They are placed in a Situation of great Difficulty, if, conscientiously thinking, that the Bankrupt has not answered to their Satisfaction, they commit him; and yet he is to be discharged, because he has answered, not to their Satisfaction, but to the Satisfaction of some other Jurisdiction. It is however settled, that such is the Law: when therefore the Question comes forward upon the Return of the Writ, upon the two Cases before me the Thing rests here: is the Question answered to the Satisfaction of the Judge, before whom the Writ comes: the Law of *Pedley*'s Case (*c*), that a Bankrupt, giving a full, complete, and, as the Expression is, round, Answer, whether credible, or not, cannot be committed, being now exploded and displaced by the later Cases; which have decided, that it is the Province, first, of the Commissioners, and then of the Court, to say,

(*a*) 11 *Ves.* 511.
(*b*) 8 *Ves.* 328.
(*c*) *Leach*, 365.

hether

1813. OLIVER, *Ex parte.*

whether they believe him: but, if that is the Question before the Judge, it appears clear to me, that it is impossible for the Judge to determine upon any Thing but what is to be found in the Return to the Writ; and I am not in the least affected by the Bankrupt's Conduct on any other Day, or any other Occasion, with reference to any other Question or Answer whatsoever.

It appears to me upon this Return, that the Commissioners have stopped very short in this Inquiry. The Statute frequently raises a Question of great Difficulty upon the Words "all lawful Questions." I make no Distinction between a Man of Rank and Opulence and one in a lower Station. Regarding the Feelings of the Man I must consider, that he might be as much distressed by the Possibility of such a Discovery as a Person of a Rank much more elevated. I can therefore give Credit to much of the Influence he was under to keep this Secret: but, if he refuses to tell what became of the Money, he must submit to the Consequences of being unable to give a satisfactory Answer. He is not bound to answer a Question, that has a Tendency to accuse him of a criminal Act: but he must submit to the Consequence of that Refusal being unsatisfactory; as there is nothing unlawful in this Question upon the Face of it.

That however is not this Case; as this Person admits the Criminality. He does answer the Question. I have said, the Commissioners were short in their Examination. Why did they not ask him, whether, meeting this Man at the *Plough* in *Smithfield*, he did not inquire there, who he was. I conceive, there was nothing improbable in his not asking, who the Boy was, who brought the Notes to him, or in his not producing the Notes. It was much more probable, that he would destroy them: but, delicate and distressing as the Duty is, the Commissioners had to determine

determine whether to commit, or to put those delicate and distressing Questions, which, discrediting his Account, I conceive they were, not only authorized, but bound, to put, all Questions, that would enable them to correct their Disbelief; even to the Extent of inquiring, who the Woman was.

My Opinion is therefore clear, that the Commissioners must farther examine this Bankrupt; in order to ascertain, whether they abide by their Opinion; and with regard to the other important Point, the Time I shall require for the Consideration of that, I am bound to ask with reference even to the Individual, upon whom it presses. I therefore postpone the Determination, whether the Bankrupt is to be discharged in the mean Time, until twelve o'Clock To-morrow. Let him be brought up again at that Time.

The Lord CHANCELLOR.

Aug. 20.

I have given to the Doctrine applying to this Case, and its Circumstances, confining my Attention to what is within this Return, all the Consideration I could usefully apply to it; and the Opinion I have formed is this. I cannot say, these Questions were so satisfactorily answered, that I ought to discharge the Bankrupt; who must therefore be remanded: but I earnestly wish the Commissioners to call him again before them, and to ask him those Questions, which appear to me likely to produce a satisfactory Answer. I can only recommend this to the Commissioners; who must act upon their own Judgment: but I think, they will act right in taking this Course (1).

(1) *Ex parte Hiams*, 18 *Ves.* 237. *Coombes'* Case, and *Brown's* Case, 2 *Rose's* Bank. Ca. 396, 400.

1813,
Aug. 20.

WILSON, *Ex parte* (1).

Mortgagee not entitled to an Account of past Rents from the Mortgagor.

THE Petition stated a Mortgage by *William Adams* and *John Stuart* to the Petitioner for £1000: the Premises being at that Time under Lease; and the Mortgage made expressly subject and without Prejudice to that Lease; that the principal Sum of £1000, and a considerable Arrear of Interest was due to the Petitioner: that *Adams* died in *March*, 1811; and *Stuart* became Bankrupt in *January*, 1812; that the Petitioner gave Notice to the Tenant in Possession to pay the Rent to the Petitioner only: but notwithstanding such Notice, and that the Premises were a scanty Security, the Assignees had received the Rent, amounting to £120 : 7*s* : 4*d*.

The Petition prayed, that the Assignees may be ordered to pay to the Petitioner the said Sum of £120 : 7*s* : 4*d*. an Account of the Principal, Interest, and Costs, the usual Order for Sale; and that the Petitioner may be at liberty to prove for the Deficiency.

Mr. *Montague*, in support of the Petition.

Sir *Samuel Romilly*, for the Assignees.

The Lord CHANCELLOR.

Mortgagee's Right to distrain after Notice.

Admitting the Decision of *Moss* v. *Gallimore (a)* to be sound Law, I have been often surprised by the Statement, that a Mortgagor was receiving the Rents for the Mortgagee. That is one of those Cases, which have led me to doubt, whether Lord *Mansfield* was not sometimes ap-

(*a*) *Doug.* 266.

(1) *Rose's* Bank. Ca. 444.

plying, as the Doctrine of a Court of Equity, what never had been so. In the Instance of a Bill filed to put a Term out of the Way, which may be represented as in the Nature of an equitable Ejectment, the Court will in some Cases give an Account of the past Rents: but a Mortgagee never can in this Court make the Mortgagor account for the Rents for the Time past. There is not an Instance, that a Mortgagee has *per directum* called upon the Mortgagor to account for the Rents. The Consequence is, that the Mortgagor does not receive the Rents for the Mortgagee.

1813. WILSON, *Ex parte.* Under a Bill to put a Term out of the Way in some Cases an Account of the past Rents given.

The Petition was dismissed.

1813, *Aug.* 20.

WOOLLEY, *Ex parte* (*a*).

THIS Petition prayed, that the Petitioner may be admitted to prove a Debt; which had been rejected on the Ground, that the Petitioner, having brought an Action, did not produce a Rule for Discontinuance.

The Discontinuance of an Action under Stat. 49 *Geo.* 3. c. 121. s. 14. a Consequence of proving in Bankruptcy: not a previous Condition.

Mr. *Leach*, and Mr. *Montague*, in support of the Petition said, this was not required by the Act of Parliament (*b*): nor was it reasonable to call on the Creditor to discontinue at the Hazard, that his Proof might be rejected.

The Lord CHANCELLOR made the Order; observing that it is not necessary, that the Creditor should agree to relinquish his Action: that being the Effect of proving under the Commission.

(*a*) 1 *Rose*, 394. (*b*) Stat. 49 *Geo.* 3. c. 121. s. 14.

WENSLAY,

1813,
Aug. 20.

WENSLAY, *Ex parte* (*a*).

Joint Debts paid by a Bill, drawn by one of the Debtors, and accepted by another, each carrying on distinct Trades: Proof under their separate Commissions upon the Bill.

THE Petitioners having supplied Goods on the joint Account of *Ford, Price* and *Cross*, and *Gilbert*; for a Cargo, in which they were jointly interested, received in Payment a Bill, drawn by *Ford*, who carried on a distinct Trade; and accepted by *Price* and *Cross*, also a distinct House of Trade. The Petitioners proved a Debt upon that Bill under a Commission of Bankruptcy against the Acceptors; and afterwards proved under a Commission against the Drawer. The Petition prayed Payment of the Dividend, under the Commission against the Drawer.

Another Petition was presented; praying, that the Proof under the Commission against the Drawer may be expunged.

Sir *Samuel Romilly*, and Mr. *Bell*, for the Creditors claiming the Dividend: Mr. *Leach*, and Mr. *Cooke*, for the Assignees. The Cases *Ex parte La Forest* (*b*) and *Ex parte Bonbonus* (*c*) were cited.

The Lord CHANCELLOR.

These Goods were sold to the Partnership; and the Mode of Payment, accepted by the Vendors, is a Bill payable to themselves, not on the Partners; whose Name is not upon the Bill, but on Persons, forming another House. These Petitioners are clearly entitled to prove against the Drawer. This does not contradict the Cases of *La Forest* and *Bonbonus*. In the former the Two were in Fact the Four; carrying on Business in the Name of the Four.

(*a*) 1 *Rose*'s Bank. Cas. 266. (Ed. 6.)

(*b*) 1 *Cooke*'s Bank. Law, 441.

(*c*) 8 *Ves.* 540.

WILLIAMS,

1813, *Aug.* 20.

WILLIAMS, *Ex parte.*

Commission of Bankruptcy cannot be superseded, before it is sealed: but the petitioning Creditor delaying to seal it, and taking that Objection, the Time for sealing it was limited to three Days.

THE Prayer of this Petition was, that a Commission of Bankruptcy against the Petitioner may be superseded. The Docket was struck on the 23d of *July*. On the 27th the Commission was bespoke; and the Fees paid: but the Creditor had not proceeded to seal the Commission. On the 26th of *July* the Petition to supersede was presented; and an Affidavit in support of it was filed on the 5th of *August*; of which on the 12th a Copy was bespoke; and Copies of other Affidavits were taken on both Sides.

Sir *Samuel Romilly*, in support of the Petition.

Mr. *Leach*, for the petitioning Creditor, objected, that the Commission was not sealed.

The Lord CHANCELLOR said, the Party, having done the necessary Acts, had a Right to the Commission; and he could not order a Commission to be superseded, which had not been sealed: but, conceiving this to be a Case of considerable Hardship, the Time should be limited. His Lordship declared therefore, that, unless the Commission should be sealed within Three Days, he would not seal it.

EDWARDS

1813,
Aug. 20.

EDWARDS *v.* M'LEAY.

Liberty to file a supplemental Answer relative to a Fact on Defendant's Affidavit, that at the Time of filing the Answer he had no Recollection of the Fact; and had since discovered it.

A MOTION was made on the Part of a Defendant, that in consequence of his having since the filing of his Answer discovered an Entry or Minute in the Committee Book of *Clapham* Parish relative to the Common Land in such Parish, dated the 1st of *June*, 1801, the said Defendant may be at liberty to file a supplemental Answer in this Cause, to correct and explain his Answer already filed, so far as applies to the said Entry or Minute.

The Affidavit of the Defendant stated, that at the Time of filing his Answer he had no Recollection of such Entry; or of his having been present, when it was made; but that he had since learnt the Facts to be so.

Mr. *Hart*, and Mr. *Shadwell*, in support of the Motion.

Sir *Samuel Romilly*, Mr. *Leach*, and Mr. *Spranger*, for the Plaintiff, objected, that according to the Case of *The King* v. *Carr* (*a*) a Prosecution for Perjury may thus be entirely defeated.

The Lord CHANCELLOR.

Leave to amend an Answer refused.

There are many Cases, in which Lord *Thurlow* refused Leave to amend an Answer; and that is obviously right upon this Reason; that the Court, permitting the Destruction of the Answer upon the Record, and the Substitution

(*a*) 1 *Sid.* 418. 2 *Keb.* 516.

of

1813.

EDWARDS v. M'LEAY.

of another, has no Security as to the Propriety, with which the first Answer was sworn. The Course since has therefore been to permit an additional Answer to be filed; which has been done in many Instances (*a*); always with great Difficulty, where an Addition is to be put upon the Record, prejudicial to the Plaintiff; though the Court would be inclined to yield to the Application, if the Object was to remove out of the Plaintiff's Way the Effect of a Denial, or to give him the Benefit of an Admission, material, perhaps conclusive, to enable him to obtain a Decree. Where therefore the Opposition to such Application is not upon the Ground, that it is against the Plaintiff's Interest that such supplemental Answer should be put in, that with reference to his Interest in that Cause or Property any Mischief can arise to the Plaintiff, the only Ground for Hesitation is the public Interest, upon the Circumstance, that the Defendant might have been guilty of Perjury, and a Prosecution for that Offence may be required by the public Interest. In several Instances, though that has been alledged, the Court has permitted such supplemental Answers. On the one Hand it has been constantly argued, that, permitting it, the Court decides against the Prosecution; in the other it is frequently urged with Weight, that the Court, refusing this, goes a great Way towards convicting the Defendant (*b*). The Truth is, this Permission ought to have no Influence either

Additional Answer admitted with Difficulty, if prejudicial to the Plaintiff: easily, if for his Benefit: subject, if no such Objection, to the Propriety of a Prosecution for Perjury.

Permission to file a supplemental Answer, or the Refusal of it, to have no Influence on a Prosecution for Perjury.

(*a*) *Livesey* v. *Wilson*, *ante*, Vol. I. 149, and the References in the Note, 150; also *Strange* v. *Collins*, *ante*, 163, and *Alpha* v. *Paynam*, 1 *Dick*. 33. *Dagly* v. *Crump*, 1 *Dick*. 35. *Kingscott* v. *Bainsly*, 2 *Dick*. 485. *Patterson* v. *Slaughter*, 1 *Dick*. 285. *Wharton* v. *Wharton*, 2 *Atk*. 294. *Verney* v. *Macnamara*, 1 *Bro*. C. C. 418.

(*b*) See the *Lord Chancellor*'s Observations in *Strange* v. *Collins*, *ante*, p. 166.

Way

1813.

EDWARDS v. M'LEAY.

Way upon such Prosecution: but a Case was mentioned by Mr. *Spranger*, which throws much Difficulty in the Way: *The King* v. *Carr* (*a*): upon an Indictment for Perjury in an Answer, to which Exceptions were taken, and a second Answer put in, giving an Explanation, it was resolved, that nothing shall be assigned as Perjury, which is explained by the second Answer; because the second Answer makes that, which was at first a Perjury, no Perjury. Whether that would be held now, or not, there is a material Distinction from this Case. The Habit of the Court now is to consider an insufficient Answer as no Answer: if the Exceptions produce an Explanation, the two are taken as one Answer; and perhaps in Favour of a Person accused the Court might hold them to be one Answer, containing the Explanation with the Assertion constituting the Charge. I should have had considerable Difficulty in acceding to that: upon this Application for leave to put in a supplemental Answer, considering all the Consequences, and professing not to hold, that the Explanation by such other Answer takes away the Opportunity of indicting upon the former Answer, I think I ought to permit a supplemental or other Answer to be filed in this Case on Payment of Costs.

Insufficient Answer no Answer. When Exceptions are answered, the whole taken as one Answer.

Explanation by a second Answer does not take away the Opportunity of indicting upon the former Answer.

The Order states, that his Lordship doth not think proper to make any Order in the Terms of the Notice of Motion; but doth order, that the said Defendant (upon Payment of Costs to the Plaintiff) be at liberty to file a second Answer in this Cause relative to the Entry or Minute as aforesaid.

(*a*) *The King* v. *Carr*, 1 *Sid.* 418. 2 *Keb.* 516.

CHAMBERLAIN

CHAMBERLAIN v. AGAR.

1813, *Nov.* 10.

The Bill, alleging the Suppression of a Codicil, an Assurance by the Testator, that he had directed his Executors and residuary Legatees to pay an Annuity, and their Promise to him accordingly repeated after his Death, and acted upon by actual Payment for several Years, Plea, merely denying the Execution of any Codicil, and any such Direction, over-ruled.

THE Bill stated, that for many Years previous to 1804 the Plaintiff resided in the House of *Welbore Ellis Agar*, deceased, as Housekeeper; and he, being highly satisfied with her Conduct, promised to reward her Services by granting or bequeathing to her an Annuity for Life; that accordingly by his Will, dated the 25th of *June*, 1804, a few Days previous to his Decease, and when he was on his Death-bed, he told the Plaintiff, he had taken Care of her; for that he had directed his two Sons, the Defendants, to pay her an Annuity of £200 for her Life; and they had promised him to comply with such Desire: that on another Day, a few Days before his Death, he in the Presence of the Defendants told the Plaintiff, that he had taken Care of her; and made her comfortable for Life: that, the Testator requesting the Plaintiff to procure him some Refreshment, which required her to leave the Room, the Defendants shortly afterwards came out of the Chamber; one of them having in his hand a Paper; who, being asked by the Plaintiff, whether that was his Father's Will, replied, "No, it is not his Will; it is a Letter, "which is not to be opened until after his Death; but "it contains what will make you comfortable for "Life."

The Bill farther stated, that at the Meeting after the Testator's Death for the Purpose of opening his Will some Surprise being expressed on finding no Provision for the Plaintiff, the Defendants accounted for it by stating, that the Testator had directed them, as the Executors and residuary Legatees, to pay her an Annuity during her Life;

 which

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which they had promised to do: she was then called in; when the Defendants repeated their Assurances; alledging however, that such Annuity was not £200, but only £100; which the Plaintiff, having no Means of proving her own Assertion, consented to receive; and the Defendants undertook and promised to pay such Annuity to her during her Life.

The Bill farther stated, that the Defendants had proved the Will, but not the said testamentary Paper or Codicil; that they had paid her the Annuity of £100 for several Years; but had for some Time discontinued it; and charging, that the Testator made a Codicil to his Will, or wrote a testamentary Paper in the Nature of a Codicil, wherein he bequeathed to the Plaintiff an Annuity of £200 for her Life, that the Plaintiffs had suppressed the same, and not proved it, and that the Testator had declared to several Persons that he had made a Codicil to his Will on a separate Sheet of Paper, whereby he had left several of his Friends, and the Plaintiff, Legacies, prayed, that the Defendants may be decreed to bring the said Codicil or testamentary Paper into the proper Ecclesiastical Court to be proved; an Account of the Annuity, and an Investment of Stock to answer the future Payments.

The Defendants put in a Plea to the Discovery and Relief; that the Testator did not make or write a Codicil to his Will, or a testamentary Paper in the Nature of a Will or Codicil, wherein he bequeathed to the Plaintiff an Annuity of £200, or any other Annuity, for the Term of her Life, or for any other Term, or directed the Defendants, or either of them, to pay any Annuity to the Plaintiff.

Mr.

Mr. *Shadwell*, in support of the Plea, contended, that, the Bill resting on the single Fact, that the Testator wrote a testamentary Paper in the Nature of a Codicil, giving the Plaintiff an Annuity of £200 for her Life, which Paper has been suppressed, the Plea, expressly negativing that Fact, is a good Bar both to the Relief and Discovery: *Sutton* v. *Earl of Scarborough* (*a*).

Mr. *Hart*, and Mr. *Roupell*, for the Plaintiff.

The Bill is not confined to the Right, asserted under the Codicil; proceeding also on the Promise made by the Testator to the Plaintiff, to remunerate her for her past Services; in respect of which she is entitled to a Discovery. A Defendant denying the Existence of a Deed, cannot refuse to answer those Circumstances, the Answer to which would prove its Existence. The Bill also alleges, that the Defendants expressly undertook and promised the Testator to pay the Annuity; who did not alter his Will; but suffered it to stand; relying on that Promise: *Thynn* v. *Thynn* (*b*), *Reech* v. *Kennegal* (*c*), and *Drakeford* v. *Wilks* (*d*); and the Principle is recognised by the *Lord Chancellor*, in *Mestaer* v. *Gillespie* (*e*), and *Strickland* v. *Aldridge* (*f*).

The VICE-CHANCELLOR.

The whole Object of this, which is a negative Plea, is to negative the Existence of a Will, Codicil, or testamentary Paper, by which any Annuity or Legacy is given, or the Defendants are directed to pay any Annuity or Legacy,

(*a*) 9 *Ves.* 71.
(*b*) 1 *Vern.* 296. Eq. Ca. Abr. 380. Pl. 6.
(*c*) 1 *Ves.* 123. *Reech* v. *Kennegate*, *Amb.* 67. S. C.
(*d*) 3 *Atk.* 539.
(*e*) 11 *Ves.* 621.
(*f*) 9 *Ves.* 516.

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Legacy, to the Plaintiff. It is said, this Plea does not comprehend the whole Object of the Bill; which is not simply to effectuate a Will, Codicil, or testamentary Paper, but, beyond that, to establish, that, admitting there was no Will, Codicil, or testamentary Paper, the Testator, when upon his Sick-bed, having promised to make a Provision by his Will for the Plaintiff in Requital of her Services, imposed that, his Assurance to her, as an Obligation upon his Executors and residuary Legatees; and upon the Approach of Death received their Assurance accordingly.

Relief upon Fraud in not performing a Promise, relying on which the Testator forbore to bequeath.

The Bill does not state, that in consideration of their Promise to pay that Annuity, the Testator forbore to insert it in his Will; or made the Defendants his residuary Legatees. In that respect this Case does not quite come up to the Case, determined by Lord *Hardwicke* and referred to by Lord *Eldon*; that, notwithstanding the Danger of admitting parol Declarations, the Annuitant or Legatee has a clear Title to Relief upon that Species of Fraud, which consists in not complying with a Promise, on which the Testator relied: where the Testator, having come under such an Obligation, transfers it to his residuary Legatees; who give a positive Assurance to fulfil it: the Testator relying upon that Assurance; and under that Confidence abstaining from inserting the Legacy in his Will. Although that is not expressly stated as the Nature of this Bill, the Question is, whether it does not so nearly approach those Cases as to call for an Answer. A Promise of this Nature by the Testator is expressly stated; repeated by him in the Presence of the Defendants; who adopt it in his Presence; assuring him, that they will fulfil it; after his Death representing it as the Reason for not providing for the Plaintiff expressly by the Will; correcting her as to the Amount of the Annuity; and by that Correction

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Correction admitting that they had promised to pay her £100 *per Annum*; followed by actual Payment for several Years. Does not all this require an Answer? Has not the Plaintiff a Right to a Discovery, for Instance, as to this Letter, its Nature and Circumstances; the Bill stating it; and making it the Foundation of Relief; either as a testamentary Paper, or as containing an absolute Promise from the Testator to pay this Annuity, accompanied with the Representation of the Defendants, that it would make her perfectly easy. This Plea, merely negativing one Part of the Bill, and totally silent as to all the Circumstances, even regarding that Paper, on which it tenders an Issue, and all the other Circumstances* alleged, which may entitle the Plaintiff to Relief, though no Paper exists, that can be properly described as a Will, Codicil, or testamentary Paper, is not the Answer the Plaintiff is entitled to; and must therefore be over-ruled (1).

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THE ATTORNEY-GENERAL *v.* FULLERTON.

Obligation of Tenant to preserve Boundaries; and, having permitted them to be destroyed, so that the Landlord's Land cannot be distinguished from his, and restored specifically, to substitute Land of equal Value. The Land, or its Value, ascertained by Commission.

THE Information stated the Title, under an Act of Parliament and a Decree of Lord Keeper *Wright*, of the Free School of *Pocklington* in the County of *York*: to several Parcels of Land; which, lying dispersed and intermixed with other Lands in *Thrybургh*, were let for twenty-one Years; and the Leases, being renewed, were, in 1756, vested in the Honourable *Elizabeth Finch* as Lessee. To all those Leases a Terrier or Schedule was annexed; being the Return of Commissioners antecedent

(1) *Dixon* v. *Olmius*, 1 *Cox*. 414. *Evans* v. *Harris*, *post*, 361.

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to Lord Keeper *Wright's* Decree; and which that Decree confirmed.

In 1756 *Elizabeth Finch*, being so Lessee of the Charity Lands, and Owner of all the other Lands in the Parish; (except a small Part of the Glebe) caused the Parish to be surveyed; and all the Pieces of Land lying in the open and uninclosed Fields of the Parish (except the Glebe) were then laid together for the Convenience of measuring; and she allotted a certain Portion in lieu of the Charity Pieces, so dispersed.

The Tenants of the allotted Estate having attorned to the Master of the School, an Ejectment was brought by the Representative of *Judith Finch*, the Lessee under the last Renewal in 1806; upon which the Information was filed; prayed a Commission for setting out the Charity Lands, as described in the Terrier or Schedule; an Injunction against cutting Trees on the allotted Estate, and to restrain Proceedings in the Ejectment.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Barber*, for the Information, shewed Cause against dissolving the Injunction upon the Answer.

Mr. *Hart*, and Mr. *Daniel*, for the Defendant.

The Lord CHANCELLOR.

It has been long settled, and that Law is not now to be unhinged, that a Tenant contracts among other Obligations, resulting from that Relation, to keep distinct from his own Property during his Tenancy, and to leave clearly distinct at the End of it, his Landlord's Property, not in any Way confounded with his own. This is therefore a common Equity; that a Tenant, having put his Landlord's Property

and his own together, for his own Convenience, in order to make the most of it during his Tenancy, is bound at the End of the Term to render up specifically the Landlord's Land; and, if he cannot, that a Commission shall issue from a Court of Equity to inquire, what were the Lands of the Landlord: the Court taking Care, to the Intent, that the Tenant may discharge his Obligation, to do what is right as to the Possession in the mean Time; and if the Tenant has so confounded the Boundaries, subdividing the Land by Hedges and Stones, and destroying the Metes and Bounds, so that the Landlord's Land cannot be ascertained, the Court will inquire, what was the Value of the Landlord's Estate, valued fairly, but to the utmost, as against that Tenant, who has himself destroyed the Possibility of the Landlord's having his own.

In this Instance I am satisfied, that no Fraud was intended: on the contrary the Occupation of the Family Estate with that of the Charity was probably for Accommodation both to the Family and the Schoolmaster and Usher. This is not a Case, of which we have had too many, where the Charity has not had what is its own: but the Property of the Family and the School appears in singular Circumstances upon this Map: a great Number of Stripes of Common-field Land; which could only be enjoyed by leaving natural Soil not ploughed, or by Metes and Bounds; and that was intended: but the Defendant, and those, under whom he claims, have permitted their Tenants to destroy those Boundaries; and it is now contended, that upon this Plan enough has been done to enable the Schoolmaster to take Possession of his own Estate. That cannot be; unless it can be ascertained, in what identical Part of the Field these Stripes of Land are, and he can go to some Land, which he can demonstrate as his own. Upon this Plan and Admission it is impos-

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sible for him to go to any Part of the Land, and say, that is his Land; and whose Fault is that? It is admitted, that he has got Land, belonging to this Family; but that mere Fact, unless they can restore to him that, which is unquestionably his, does not amount to an Equity to put an End to this Injunction; as the Equity is, that unless the Tenant can ascertain the Land of the Landlord, the latter shall have an equal Quantity of the Tenant's Land. Both Parties are wrong in this Case. If the Schoolmaster has got Possession by Means, to which he had no Right to resort, no Application was made to prevent him: but that Observation is made by the *Defendant*, in Possession by Wrong of Land, belonging to the Charity; and, if he cannot point out that Land, and it cannot be ascertained amicably, a Commission must go, to ascertain, what Land belongs to the Charity, and what does not; and if that cannot be ascertained, the Value of the Land, that did belong to the Charity, must be ascertained.

The Injunction was continued.

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WATMORE *v.* DICKINSON.

1813, *Nov.* 12.

Order to examine Witnesses in support of Articles, exhibited to discredit a Witness, on Notice and the Six Clerk's Certificate, without Affidavit.

A MOTION was made on the Part of the Defendant for leave to examine Witnesses in support of Articles, exhibited to discredit a Witness, examined on the Part of the Plaintiff. This Motion was made on Notice and the Six Clerk's Certificate, that the Defendant had filed an Article exhibited to discredit the Testimony of the particular Witness.

Mr. *Wilson*, for the Plaintiff, objected, that the Motion was special; and could only be made on Affidavit; referring to *Purcell* v. *M'Namara* (*a*), *Wood* v. *Hammerton* (*b*), *Mill* v. *Mill* (*c*), Practical Register (*d*), and Mr. *Newland's* Pract. Ch. (*e*); distinguishing *Russel* v. *Atkinson* (*f*); as this Plaintiff is brought here on Notice.

Mr. *Cooke*, in support of the Motion, insisted, that it is not the Practice to move on Affidavit; and *White* v. *Fussell* (*g*) is a precise Authority; the *Lord Chancellor* having allowed Interrogatories to be filed to discredit a Witness merely

(*a*) 8 *Ves.* 324.
(*b*) 9 *Ves.* 145.
(*c*) 12 *Ves.* 406.
(*d*) 420, (*Wyatt's* Ed.)
(*e*) Page 141.
(*f*) 2 *Dick.* 532.
(*g*) 6th *July*, 52 *Geo.* 3. The Order states, that on Motion for the Defendant, alledging (*inter alia*) that the Plaintiff had examined a Person of the Name of *W C.*; and that the Defendants had filed Articles with the Six Clerk, as by his Certificate appeared, to the Credit of *W. C.*, and praying, that the Defendants might take out a Commission for Examination of Witnesses in support

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merely on Notice: the Order taking no Notice of any Affidavit: which, if read, must have been entered.

The VICE-CHANCELLOR.

The Case of *White* v. *Fussell* seems precisely in Point: but, independent of that Authority it does not necessarily follow, that a Motion, because it is special, must be supported by Affidavits. That depends upon the Nature of the Motion. The Articles disclose the Cause for this Examination; which, if it goes to the Credit of the Witness, is in Time. What is the Affidavit to state but that such is the Stage of the Cause; and that the necessary Preliminaries are taken by filing the Articles. If the Affidavits were to go to the Point of the Examination, that would be discussing previously upon Affidavit the very Point of Credit; which is to be the Subject of future Examination; if it is fit to exhibit Interrogatories. The only proper Question, as Mr. *Cooke* has observed, is, whether the Witness is worthy of Belief upon his Oath. That does not necessarily call for any antecedent Inquiry upon Affidavit; and the Books of Practice, though representing this as a special Motion, and to be sparingly granted, state no general Rule, that it must be made upon Affidavit: nor does the *Lord Chancellor* in *White* v. *Fussell* understand the Practice to require, that an Affidavit must be necessarily the Foundation of such a Motion.

Therefore both upon Reason and Authority there is no Necessity for such an Affidavit; and this Motion is properly made.

support of said Articles to discredit said C.: whereupon, and on hearing *Hall* for Plaintiff, his Lordship did order, that the Defendants be at liberty to examine Witnesses by general Interrogatories as to the Credit of *C.*, and as to such particular Facts only as are not material to what is in Issue in this Cause; and to take out a Commission for that Purpose, &c.

NOEL

NOEL *v.* WESTON.

1813, *Nov.* 12.

After a general Direction, that Debts, Funeral and testamentary Charges shall be paid, and a Bequest of the personal Estate subject to the Payment of those Charges, the Testator, in case his personal Estate should not be sufficient to discharge "the "same," charged his Freehold Estates with Payment "thereof," and "subject "thereto," gave all his Freehold and Copyhold Estates, which he had surrendered, or intended to surrender, to the Use of his Will. The Copyhold Estates charged.

Construction for Creditors favoured; not doing Violence to, or straining, the Words.

JOSEPH Shaw by his Will, dated the 24th of *February*, 1803, after desiring, that his "just Debts, Funeral Charges, and Charges of Probate," should be paid and satisfied, proceeded as follows:

"*Item*, I hereby give and bequeath unto *Sarah Weston*, "Wife of *James Weston*, now residing with me, all my "Household Goods Plate Linen and China and other "my personal Estate of what Nature or Kind soever and "wheresoever to and for her own Use and Benefit subject "nevertheless to the Payment of all my just Debts, Funeral Expences, Charges of proving this my Will and "the Legacy hereinafter mentioned: but in case my personal Estate should not be sufficient to discharge the "same then I do hereby charge and make chargeable all "my Freehold Estates with Payment thereof and subject "thereto I give devise and bequeath all my Freehold and "Copyhold Estates which I have surrendered or intend "to surrender to the Use of this my Will unto the said "*Sarah Weston* for and during the Term of her natural "Life;" with liberty to lease the same; with Remainder to *Henry Croasdaile* and *Charlotte Croasdaile* their Heirs and Assigns, as Tenants in Common.

The Bill was filed by Creditors; and the Question was, whether the Copyhold Estates were applicable to the

Debts;

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Debts; the Bill praying a Sale of the real and Copyhold Estates for that Purpose.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Bell*, for the Plaintiffs: and Mr. *Benyon*, for a Defendant in the same Interest.

The recent Decisions favor Charges to pay Debts. The primary Intention of this Testator is the Discharge of his Debts: he has surrendered his Copyhold Estates to the Use of his Will; and devises them with his Freehold Estates, subject to the Payment of his Debts; not confining those Words to the Freehold; and disposing of the Copyhold by a distinct Devise. The introductory Clause admits no Doubt; and the subsequent Clauses only point out the Order of Appropriation; that, after exhausting the personal Estate, the Freehold was next to be resorted to, and, lastly the Copyhold. The Doubt, which formerly prevailed, whether a mere Direction to pay Debts amounts to a Charge, has been long at rest: *Kidney* v. *Coussmaker* (*a*), *Batson* v. *Lindegreen* (*b*), *Chitty* v. *Williams* (*c*), *Powell* v. *Robins* (*d*), and *Harris* v. *Ingledew* (*e*).

Mr. *Martin*, and Mr. *Wetherell*; Sir *Arthur Piggott*, and Mr. *Cooke*; Mr. *Richards*, and Mr. *Dowdeswell*; for the several Defendants.

This Case turns altogether on the Intention; and the Question is, whether a mere Indication of Intention, that the Debts shall be paid, amounts to a Charge, where a specific

(*a*) 1 *Ves.* jun. 436.
(*b*) 2 *Bro. C. C.* 94.
(*c*) 3 *Ves.* 545.
(*d*) 7 *Ves.* 209.
(*e*) 3 *P. Will.* 91.

specific Fund is appropriated to that Purpose. It is immaterial to consider, what would have been the Effect of the first Clause; if it stood alone; as the whole Will must be taken together.

The Testator clearly having had his Copyhold Estates in view, this Court cannot supply the Charge, which the Will omits. Where is the Distinction between this Case and that of a Testator, having two Estates, the one in *Middlesex*, the other in *Surry*, charging one with the Payment of his Debts, and "subject thereto" devising both to *A*. Could that by necessary Implication charge the other? Here are no Words of Charge, as applied to the Copyholds: nor is there any Indication of an Intention to charge them: the Words "subject thereto," applying only to the Freehold Estates; and being thus perfectly satisfied. The Testator made his Will under the Impression, that his personal Estate would be sufficient to pay his Debts; and, to supply the possible Deficiency, never looked beyond his Freehold Estate: the Court cannot even for this Object make a Will for him.

The VICE-CHANCELLOR.

General Rules of Construction of a Will.

It is properly observed, that the Testator's Meaning is to be collected from the Will itself; taking in Aid the general Rules of Construction, established by Decision; that the Court is not to make a Will, but to declare the plain Meaning of the Words; and the Intention of this Testator as to the Discharge of his Debts and making the Copyhold Estate liable, is to be collected from two Circumstances: 1st, the general introductory Clause: 2dly, the specific Language, in which the Copyhold Estate is devised. The introductory Clause expresses the general Intention, that his Debts, Funeral Charges, and the Charges of Probate, shall be paid and satisfied; saying nothing there

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there as to Legacies; not in that Part of the Will directing Payment by any particular Person, or out of any particular Fund; nor directing, that they shall be first paid; but merely constituting that general Direction for Payment of his Debts, Funeral and testamentary Charges, the first Clause of his Will after the Directions as to his Funeral. That introductory Clause is to be considered as the Rule, in some Respects over-running the whole Will; unless abridged by what follows; which might confine the Execution of that Intention, that the Debts shall be satisfied, to the Means, afterwards pointed out, or particularly directed to be first applied; and Cases have been referred to, in which such general Words have not been considered sufficient: but in those Cases the introductory Words were, not general, but a Direction to the Executor to pay; confined to the Individual; to whom no real Estate was devised.

The Direction as to the personal Estate, which is by Law liable to those Burthens, is mere Redundancy; affording no Inference of any definite Purpose. Having expressed that Intention, that his personal Property shall be subject to his Debts, and a Legacy, he proceeds to make a farther Disposition, following up that Idea by Words of Reference; "but in case my personal Estate should not "be sufficient to discharge the same, then I do hereby "charge and make chargeable all my Freehold Estates "with Payment thereof."

If the Will stopped here, there would be great Weight in the Argument, considering the Introduction as answered and satisfied by this express Charge solely upon the Freehold Estate. It was strongly urged, that there is no Reason, why, charging all his Freehold Estate, he should not also charge all his Copyhold; as here he is not disposing

posing of either; but merely expressing, what are the Charges, and how his Debts are to be paid; but, whatever Argument that may afford, it must be considered with Attention to the Words immediately following: "and sub-"ject thereto I give, devise, and bequeath, all my Free-"hold and Copyhold Estates, which I have surrendered or "intend to surrender to the Use of this my Will."

This is very clearly applicable to both Freehold and Copyhold; and, without introducing other Words it is impossible to separate them. The whole Question then turns upon the Meaning of these Words, "subject thereto." They admit two Senses: subject to the Charge already made upon the Freehold Estate by the Disposition, immediately preceding; or the same Sense as the Words of Reference in the same Clause, "thereof" and "the "same." The Difficulty consists in this Ambiguity; which of these Senses, if the Words are capable of either, is the more applicable; and in such a Case of extreme Doubt, as a general Principle, not straining in Favor of Creditors, or doing Violence to the Words, but taking them to be capable of either Construction, I should rather lean towards that, which supposes the Testator as intending, that his Debts shall be paid. That Construction, which a Court of Equity must be inclined to adopt, is consistent with, and assisted by, the introductory Clause; importing generally the Intention to pay his Debts out of all his Property; not specifying any particular Part. "Subject to the Charge already made upon the Freehold "Estate," is a possible Construction: but the more natural one is, "subject to my Debts;" the whole Effect of the other being mere Redundancy and Repetition; and, if the Word "thereto" can be understood in the Sense of the preceding Words of Reference "the same," the Intention to charge the Copyhold Estate is fully expressed. The

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Testator may upon the Whole be understood as pointing out the Order, in which the general Fund shall be applicable, according to the Declaration, with which he commences, that his Debts shall be paid: first, his personal Property: then his Freehold Estate; and farther his Copyhold; which is devised under the Terms, "subject "thereto:" Words that must be struck out of the Will, as altogether inoperative, unless they have the Effect, as they may without any Strain, of applying the Copyhold Estate to the Execution of that Purpose, with which the Testator sets out; which cannot be executed without that Application.

For these Reasons, without Reference to Authorities farther than as they establish the general Principle, that in a doubtful Case the Court inclines to the Construction in favor of Creditors rather than against them, and not inserting, or straining, Words for that Purpose, I think, the fair Sense of this Will, taken altogether, with the introductory Clause, is, that the Copyhold Estate is charged; and the Testator has in different Language repeated the Purpose, before expressed, that his personal Property and his Freehold and Copyhold Estates shall be subject to his Debts.

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1813, *Nov.* 2. *Dec.* 6.

Devise in Trust for Payment of Debts does not revive a Debt, upon which the Statute of Limitations had taken Effect by the Expiration of the Time before the Testator's Death.

UNDER a Decree, directing the usual Accounts of the personal Estate, Debts, &c. of the Testator *Andrew Robinson Bowes*, the Master's Report stated, that the Testator was on the 16th of *June*, 1787, committed to the *King's Bench* Prison on the Prosecution of the King; and continued in such Custody under the said Commitment and subsequent Detainers of Creditors until his Death, on the 16th of *January*, 1810: that by his Will, dated the 12th of *April*, 1809, he gave to Trustees, their Executors, &c. all his ready Money, &c. personal Estate and Effects; upon Trust as soon as might be to convert the same into Money, and thereout to pay, discharge and satisfy, so far as the same would extend, all his just Debts, Funeral Expences and Legacies; and the Residue (if any) he gave to his Son *William Johnstone Bowes*. The Testator also devised all his Messuages, Lands, &c. to the Use of the same Trustees, their Heirs and Assigns; upon Trust by Sale or Mortgage to raise such Sums as should be necessary to pay such of his Debts, Funeral and testamentary Expences and Legacies, which the Monies to arise from his personal Estate should not be sufficient to pay; which Sums the Trustees were directed to apply and dispose of in Payment and Discharge of his said Debts, &c. which his personal Estate should not be sufficient to satisfy.

The Master farther stated, that no Action or other Proceeding was ever brought, or any of the Debts in the Schedule to his Report; that no Promise to pay the same was ever made by the Testator after the Statute of 21 *James* 1.

 c. 16,

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c. 16, had barred them; and that all the said Debts were barred by the Statute at the Death of the Testator: but, though it had been insisted before him, that, as the Testator was a Prisoner in the *King's Bench* during the Time aforesaid, all Proceedings against him would have been fruitless, and that as he had by his Will created a Trust for the Payment of his Debts all the said Debts were thereby revived and taken out of the Statute, he refused to permit the Creditors contained in the Schedule to prove.

To this Report the Creditors took an Exception; contending,

1st, That a Devise in Trust to pay Debts will revive Debts barred by the Statute of Limitations; *Anon. Salk.* (*a*), *Andrews* v. *Brown* (*b*), *Blakeway* v. *Earl of Strafford* (*c*), *Staggers* v. *Welby* (*d*), *Jones* v. *Earl of Strafford* (*e*), *Lacon* v. *Briggs* (*f*), *Oughterloney* v. *Earl Powis* (*g*), *Executors of Fergus* v. *Gore* (*h*), *Ex parte Dewdney*, *Ex parte Seaman* (*i*).

2dly, That under the particular Circumstances of this Case these Creditors ought to have been permitted to prove.

Mr. *Richards*, Mr. *Wetherell*, and Mr. *Shadwell*, for the Parties interested in the Estate: Mr. *Horne*, for the Trustees.

Though the general Question, whether a Devise in Trust to pay Debts revives a Debt, barred by the Statute of

(*a*) 1 *Salk.* 154.

(*b*) Prec. Ch. 385. 2 Eq. Ca. Ab. 579. *Gilb.* Eq. Rep. 41.

(*c*) 2 *P. Wms.* 373. 6 *Bro.* P. C. 630. Ed. 2. *Sel.* Ca. Ch. 57. See 29.

(*d*) Cited 2 *P. Wms.* 374.

(*e*) 3 *P. Wms.* 79.

(*f*) 3 *Atk.* 107.

(*g*) *Amb.* 231.

(*h*) 1 *Sch.* and *Lef.* 107.

(*i*) 15 *Ves.* 477. See 497.

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of Limitations, has been noticed in many Cases, this is the first Time it has called for Decision. It is clear that the Testator might have pleaded the Statute of Limitations; and it must be admitted, that, if the personal Estate is sufficient to pay the Debts, the Executor or Administator may insist on the Statute as well in the Master's Office as in an Action at Law. A Direction to pay Debts cannot let in a Creditor on the personal Estate; where that is the only Fund; and there is no Reason why the Introduction of real Estate into the Devise should make any Difference. In the Anonymous Case in *Salkeld* the Circumstances do not appear: nor is the abstract Proposition, there stated, merely as a *Dictum*, the Law of this Court. *Andrews* v. *Brown* is no Decision of this Point. *Blakeway* v. *The Earl of Strafford*, on a Devise to Executors, is very briefly stated; and on the Face of it bears strong Marks of Inaccuracy. The Debt was not barred: the Payment of £50 in Part having taken place within six Years before the Testator's Death. Whatever might have been the Weight of that Decision, the House of Lords afterwards over-ruled it; reversing the original Decree, and ordering the Plea to stand for an Answer, with very special Directions (*a*); and after that Decision there is no farther Account of the Case. In *Lacon* v. *Briggs* Lord *Hardwicke*'s Opinion is inconsistent with what he said in *Oughterloney* v. *Earl Powis*. The *Executors of Fergus* v. *Gore*, and *Ex parte Dewdney*, are strong Authorities against this Claim; and Lord *Kenyon*, Lord *Alvanley*, Lord *Redesdale*, and Lord *Eldon*, have at different Times questioned the Existence of any such Rule, that a Devise to pay Debts will take Debts out of the Statute of Limitations. Though the Decision of *Jones* v. *Earl of Strafford* affects to follow *Blakeway* v. *Earl of Strafford*, the Cases differ widely: the former having no such Pay-

(*a*) See Mr. *Cox's* Note, 2 *P. Wms.* 376.

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ment within six Years as the latter, nor any Circumstance taking it out of the Statute. In *Gofton* v. *Mill* (a), the Will expressly recognized the Debt; though the Testator mistook its Amount. *Legastick* v. *Cowne* (b) is a direct Decision of the Point by Lord *Macclesfield* against this Exception.

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The Question upon this Exception is, whether by this Will, first giving the personal Estate in Trust for the Payment of Debts, and, if that should be insufficient, creating an auxiliary Fund by the real Estate, revived a simple Contract Debt, upon which the Statute of Limitations had operated before the Testator's Death; which can be revived only by the Effect of these Clauses in the Will; having never been revived by any Promise during the Testator's Life: and this being a naked Case, stripped of any Circumstances, shewing either that he had at any Time recognized these Debts, or affording a Presumption of Payment. The Question therefore now comes for Determination, generally, what in all Cases shall be the Effect of a Devise of real Estate subject to the Payment of Debts; that Question arising upon Debts completely barred before the Testator's Death; and the Time in no Instance unexpired, and running at the Time of the Testator's Death: but the Statute having taken complete Effect upon all these Debts, and on some probably more than twenty Years.

It is not necessary to consider the Effect of a simple Direction to pay the Debts out of the personal Property;

(a) 2 *Vern.* 141. Pre. Ch. 9. (b) *Mos.* 391.

and

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and the Argument was properly confined to the Effect of the Devise of the real Estate; which is not liable to simple Contract Debts, otherwise than by the Will (*a*). It was contended, that, if the Testator creates a Trust of real Estate for the Payment of his Debts, without any particular Reference to Debts, barred by the Statute, the Rule is universal, that all Debts, standing in that Predicament, are revived; whatever may be the Amount, Duration, or other Circumstances; that the Devise is to be considered either as a Waiver of the Statute, or as an Acknowledgment, that such Debts existed, and were unpaid.

This is certainly a Case of very great Importance; as it must establish a general Rule, upon the Effect of this very common Clause in a Will; and it is singular, that this should still remain *vexata Quæstio*, as to the Rule of this Court: and the Inference of the Intention in creating such a Trust; upon which it must depend. The Argument was properly founded entirely on Authority; as it is difficult upon Principle to conceive, that the Testator could intend to prescribe to his Executors any Rule either in admitting or rejecting Debts; or to recognize any particular Debt as one, which had existed, and still remained unpaid: nor is it easy to infer, that the Creation of a Fund for the Payment of his just Debts can have any Operation upon the Inquiry, what are his Debts, or the Mode, in which that Inquiry is to be prosecuted: but this was represented as a fixed, invariable, Rule; not yielding to Principle; and too firmly established to admit of Exceptions.

No Case has been cited within the Period of Half a Century, in which such a Rule is stated as existing, except

(*a*) Now by Statute 47 *Geo.* 3. c. 74, the real Estates of Traders are Assets for Debts by simple Contract.

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for the Purpose of complaining of it. It was justly observed, that those Complaints are a Recognition of the Rule by very high Authorities; and there is certainly considerable Authority for concluding, that such a Rule has been understood as prevailing; that a Devise of real Estate for the Payment of Debts would let in Debts, barred by the Statute of Limitations. It must however be remembered, that the last Time it appears in Print, in the Case of *Oughterloney* v. *Earl Powis* (*a*), Lord *Hardwicke* did not consider it so established, that it should be acted upon without Consideration; expressing Surprise, how such a Rule could be established. It has received the decided Disapprobation of Lord *Kenyon* and Lord *Alvanley;* and it is impossible to read the Judgment in *Ex parte Dewdney* (*b*) without perceiving the *Lord Chancellor*'s Disapprobation of such Rule. To the floating Notion, which has certainly prevailed for a great Length of Time, countenanced by high Authorities, that there is such a Rule, must be opposed those Authorities, I have mentioned; to which may be added the Declaration of a Judge, very conversant with the Law and Practice of this Court, that there is no such Rule as to Debts positively barred; distinguishing the Case, where the Time having commenced, the Death occurs, before it has run out; and then the Trust would keep it alive.

I have paused upon this Case, not from any Doubt of the Principle, but that I might have an Opportunity of communicating with Lord *Redesdale*, and collecting all the Information, that could be obtained upon a Question of such Magnitude, involving a general Rule of great Importance, upon a Subject, that must very frequently occur; that it may be settled, and publicly known, if this

(*a*) *Amb.* 231. (*b*) 15 *Ves.* 477. See p. 497.

Clause

Clause is to have the Effect, that has been supposed; or, if not, that such a Notion as to its Operation may no longer remain afloat. With this View I have given the Question all possible Attention; I have spared no Pains in collecting every Case in Print, or that I could hear of, bearing upon it; I have traced the History of this supposed Rule to its Foundation; and have examined to the Bottom the Authorities, on which it has been supported, many in Number, and some not very correctly reported; which I have compared with the Register's Book. I shall go through those Authorities. The Result is, that, though there are many *Dicta*, there is not one Case, the Facts of which are distinctly stated, deciding, that a Debt, actually barred by the Statute, is revived merely by virtue of this Clause either as to personal or real Estate; and as to the former it has not been argued. In almost all the Cases there was a Recognition of the very Debt, either express, or by fair Inference; or the Death occurred, before the Statute had actually attached; and then according to Lord *Redesdale's* Opinion, a Trust being created for Creditors, the Statute cannot attach; and the Lapse of Time forms no Bar.

One of the earliest Cases upon this Subject is *Gofton* v. *Mill* (a); which is best reported in Precedents in Chancery. It does not appear, that the Statute was pleaded; and the very Debt was recognized by the Will, with some Difference as to the Amount. That Case therefore amounts to nothing; and was not much relied upon.

In *Salkeld* (b) an Anonymous Case is referred to, supposed to have been decided by Lord *Cowper*, stating very fully a Principle, that would justify the Argument, that

(a) Pr. Ch. 9. 2 *Vern.* 141. *Gilb.* Eq. Rep. 323. *Halsted* v. *Little, Tot.* 53.

(b) 1 *Salk.* 154.

has

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has been urged; that if one by Will or Deed subjects his Lands to the Payment of his Debts, Debts barred by the Statute of Limitations shall be paid; for they are Debts in Equity; and the Duty remains: the Statute has not extinguished that; though it hath taken away the Remedy.

I have examined, but can find no Trace of this Case in the Register's Book. The Note states no Facts or Circumstances, but mere general Propositions; in one of which as to Interest beyond the Penalty of a Bond it is certainly incorrect; being in Opposition to repeated Decisions. That Case seems to be confounded, but does not correspond in Date, with *Staggers* v. *Welby*, decided by the *Master of the Rolls*, and not in Print, except as it is referred to in *Blakeway* v. *The Earl of Strafford* (*a*); and the Circumstances, which I have taken from the Register's Book, so far from forming the Foundation of this Doctrine, do not in any Manner warrant such a Rule. Sir *Richard Earle*, having in 1695 entered into a Contract with the Plaintiff, a Builder, died in 1697, before the Work had proceeded far; when the Debt could not have been more than two Years old; having by his Will charged his real Estate with the Payment of his Debts. That Charge creating a Trust for the Creditors, when the Time had commenced, but before the Statute could operate, was clearly within Lord *Redesdale*'s Principle: besides that, the Defendant *Welby*, who was the Executor and Devisee, is stated in the Bill to have directed the Work to proceed, and to have communicated with, and promised Payment to, the Plaintiff; and, when they differed, two Surveyors were employed to ascertain the Amount; and *Welby* complained of not having an Allowance for Timber, furnished by the Testator and by himself. The Surveyors ascertained the Amount at £752; and in 1718 *Welby*

(*a*) 2 *P. Wms.* 373.

died;

died; having by his Will subjected the same Estate to his own Debt and Sir *Richard Earle's*. The Bill praying an Account, the Executrix admitted the Contract, and the Circumstances I have stated; and the Estimate of the Surveyors was found; the Complaint of *Welby* in his own Hand-writing: and then the Executrix insisted upon the Statute, and upon an Allowance in respect of those Items, which had not been allowed, as she contended they ought to have been, by the Plaintiff; and she filed a cross Bill for a Discovery.

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Under these Circumstances could a Plea of the Statute be allowed? The Debt was not barred; and, had it been barred, the Conduct of the Executrix would have revived it: yet this is the Case represented in *Blakeway* v. *The Earl of Strafford* as laying the Foundation of this Doctrine.

There is a Case, *Andrews* v. *Brown* (a), in 1714, previous to *Staggers* v. *Welby*; containing *Dicta* that go the full Length of this Argument, and farther: viz. that, whereever personal Property is given, or there is any written Declaration, that the Debts shall be paid, independent of the Will, it shall have this Effect: but the Facts by no Means warrant that Conclusion. Upon them, without straining to consider the Party as advertising for, and expressly inviting Debts, that were barred, there is a fair Acknowledgment of those outstanding Debts. The Debtor was a fugitive Bankrupt. It does not appear, that the Defendant insisted on the Statute: but, if he had, the Advertisement to all the Creditors, all being in the same Predicament, must be taken as an Invitation and Engagement to the Creditors, to whom it was addressed; and, considering how little is sufficient to revive a Debt, barred by

(a) Pre. Ch. 358.

the

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the Statute, that might have been deemed sufficient as an express Recognition of the Debts, that had been barred.

The Case of *Blakeway* v. *The Earl of Strafford* (a), which was carried to the House of Lords, is a very important Authority; and the Date is material. Considering the Facts of that Case, it is extraordinary, how such a Decision as Lord *King's* could have been made. How could the Statute be pleaded? a Trust having been created when the Debt was clearly existing. The Trustees were Trustees for that Creditor, upon Trust to pay that Debt. The Decision of the House of Lords, reversing Lord *King's* Decree, is extremely strong; saving the Benefit of the Plea to the Hearing; which, if the mere Circumstance of making the Will would be an Answer to the Statute, ought to have been over-ruled. The Effect of the Decree, with that Variation, is, that, if the Party failed in making out the special Acknowledgment, the Will alone would not be an effectual Answer to the Statute.

This is the fair Inference from the Decision of the House of Lords: but four Years afterwards another Case came under the Consideration of Lord *King;* who, aware, as he must have been, of the Ground of that Reversal, states the Principle, that governed the House of Lords; that a Plea of the Statute is good, if there is nothing but a Will, creating a Trust for Debts. This Case, *Le Gastick* v. *Cowne* (b), is a most material Authority; the Allowance of the Plea being a direct Decision of the Point by Lord *King*; who first decided *Blakeway* v. *The Earl of Strafford,* and knew the Result of that Case; stating his Knowledge, that the Lords were of a different Opinion

(a) 2 *P. Wms.* 373, 6 *Bro.* P. C. 630, Ed. 2. *Sel.* Ca. Ch. 57.

(b) *Mos.* 391.

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from Lord *Cowper*; and, grounded upon that Knowledge, his own Opinion, that, generally, a Trust of real Estate by Will for the Payment of Debts will not of itself operate as an Answer to the Statute. It is however proper to observe, that in the Register's Book (*a*) an important Fact appears, which might make a material Difference. The Debt was contracted in the beginning of 1707; and the Testator died in *May*, 1712, before the six Years had elapsed: consequently it is open to the Observation, that the Devise was interposed, before the six Years elapsed. The Defendant pleading the Statute, negatives a Demand within six Years; and Lord *King*, taking the Question up generally, as upon the Statute and the Will, decides without adverting to those special Circumstances. This Case, which I consider as deriving very considerable Authority from the Circumstances I have stated, goes the full Length of negativing the Proposition, that the Will alone takes a simple Contract Debt out of the Statute.

Previous to that Case another had intervened, *Vaughan* v. *Guy* (*b*), referring to this Doctrine: but the Facts did not call for a Decision to that Extent; sufficiently justifying the Court in over-ruling the Plea: the Death having occurred, before the Statute had Operation; when therefore a Trust was created upon a subsisting Debt, not barred.

The next Case is *Jones* v. *The Earl of Strafford* (*c*), also before Lord *King*, assisted by Lord *Raymond*: who thought that ought to take the same Course as *Blakeway* v. *The Earl of Strafford*; leaving untouched the Weight and Authority of that Decision by the House of Lords.

(*a*) 11th *July*, 1737, Reg. Lib. B.

(*b*) *Mos.* 245.

(*c*) 3 *P. Wms.* 79.

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The Case of *Morse* v. *Langham* (a) is not in Print: but I have been favoured with Manuscript Notes of it: the one I received from the *Lord Chancellor*, the other from Lord *Redesdale*. The former represents it as a Bill against an Executor upon a Note, given by the Testator in 1725; upon which an Action was brought in 1736: to which the Statute was pleaded. The Equity of the Bill was, that by a Will, made a Year after the Date of the Note, the Testator had devised his Estate, charged with his Debts. The Answer, admitting the Note, insisted upon the Statute. The *Master of the Rolls* said, it was a plain Case; that the Debt, though at Law barred by the Statute, being kept alive by the Charge upon the real Estate, and intended to be paid, was not barred, when the Will was made, by which the Estate was subjected to the Debts: and the House of Lords had with the Advice of all the Judges held, that a Trust was not barred by the Statute. The Decree was accordingly pronounced for the Plaintiff.

I have compared this Case with the Register's Book; and find, that a material Fact is omitted in that Note; which might make a considerable Difference; and proves that Case to be no Authority upon a Debt by simple Contract, actually barred before the Testator's Death. I do not rely upon the Circumstance, brought forward by this Note, that the Will was made within six Years. The Time of the Death is to be looked to; not that of making the Will; and the Time of the Death is not stated in the Note: but it appears by the Register's Book, that the Plaintiff lent the Testator £20 upon his Note in *April* 1726; who by his Will made twelve Days afterwards subjected his real Estate to his Debts; directing the De-

(a) At the Rolls, 1st *July*, 1737.

fendant,

fendant, his Son, who was his Heir, Devisee, and Executor, to pay his Debts and Legacies out of his real and personal Estates; and the Answer admitted, that the Death took place on the 28th of *April*, 1726; the Note having been given on the 5th; and the Will being made on the 18th. It was clear therefore, that the Statute could not be urged by the Trustee against the *Cestui que* Trust, calling for an Account. The Creditor died in 1733. The Answer contains an Admission, that might perhaps be considered as an Acknowledgment, that would take it out of the Statute: but, independent of that, the Circumstance of the Death is quite sufficient. The Decree accordingly directed an Account of the Principal and Interest due, and Payment.

The Case of *Lacon* v. *Briggs* (*a*), as far as regards the Facts and the Decision, proves to be as little an Authority upon this Subject; though Lord *Hardwicke* by what he is reported to have said appears to give considerable Countenance to the Existence of such a Rule: but this Review of the antecedent Cases shews, that there is no Authority applying directly to the Point, where the Statute had actually attached. If the Reference to Lord *Strafford's* Case, as establishing the Rule, is to be considered as made by Lord *Hardwicke*, it is extraordinary; when Lord *King* had on the Authority of that Case decided against that Rule; and ten Years afterwards Lord *Hardwicke* himself, so far from considering the Rule so settled by Lord *Strafford's* Case, refers to it, as having shaken the Doctrine.

The next Case is *Oughterloney* v. *Earl Powis* (*b*); and there Lord *Hardwicke's* Language is very different. He dismissed the Bill; presuming Satisfaction; which removes all the Effect of the virtual Acknowledgment;

(*a*) 3 *Atk.* 105. (*b*) *Amb.* 231.

but

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but in addition to that this Case shews, that Lord *Hardwicke* certainly did not consider the Doctrine established; referring expressly to Lord *Strafford's* Case, as having considerably shaken the Authority of former Determinations.

The Case of *Ketelby* v. *Ketelby* (a), from the Expression, where it is mentioned in *Anstruther*, might be supposed to involve this Question: but upon examining the Register's Book I find, that the only Point was that upon the Exceptions with reference to Interest, and the Distinction in that respect between Creditors by Bond and simple Contract; and there is no Trace of this Point either decided or raised: nor upon the Circumstances could it have arisen.

There is a *Dictum* of Lord *Mansfield* (b), shewing his Conception of this Doctrine of a Court of Equity; and that such an Idea had been afloat upon this Subject; which is abundantly proved: but the Principle and Authorities had not been then examined. In *The Executors of Fergus* v. *Gore* (c) Lord *Redesdale*, when this Point was drawn to his Attention, expresses his Doubt, whether there ever was such a Decision as that reported in *Blakeway* v. *The Earl of Strafford*; and lays down this clear Rule: "That a Devise in Trust for Payment of Debts does not prevent setting up the Statute; if the Time had run before the Testator's Death; for, if it has run in the Life of the Testator, the Debts are presumed to be paid: but, where a Provision is made by Will for Payment of Debts, the Statute does not run after the Death of the Testator. It is an Acknowledgment of the Debt."

Lord *Redesdale's* Opinion, that Debts, upon which the Time limited by the Statute of Limitations has run, are presumed to be paid.

(a) 2 *Dick.* 512. Cited 2 *Anstr.* 527.

(b) *Cowp.* 548, *Trueman* v. *Fenton.*

(c) 1 *Sch. & Le Froy*, 109.

Though

Though this is not the Point decided, Lord *Redesdale*'s Declaration may be opposed to those of his Predecessors.

The only Case remaining to be noticed is *Ex parte Dewdney* (*a*): not a direct Decision; but shewing the *Lord Chancellor*'s Impression upon this Point. I applied to the *Lord Chancellor* for the Case before Sir *Thomas Sewell*; to which his Lordship refers. The Note states merely, that Sir *Thomas Sewell* held, that a Bond Debt, supposed to be satisfied, was revived by the Trust; but that was afterwards reversed by the *Lord Chancellor*: a strong Authority against this Argument: the Judgment of the *Master of the Rolls*, sustaining the Debt against the Presumption from Length of Time, being over-ruled by the *Lord Chancellor*.

I have now gone through all the Cases, that are to be found in Print or Manuscript upon this important Question: and the Result is, that there is not one, in which this Doctrine has been established to the full Extent, that has been contended; that it rests simply upon *Dicta*, opposed by *Dicta*; and has been disapproved by every Judge from the Time of Lord *Hardwicke*; that it is contrary to the Decision in *Legastick* v. *Cowne* (*b*), and to the final Decision in Lord *Strafford*'s Case, followed by the ultimate Decision of Lord *King*; who first determined that Case; and substantially contradicted by every subsequent Authority.

If the Question is to be considered still open upon the conflicting Authorities, how does it stand upon Principle? It must depend upon that, which alone can subject a real

(*a*) 15 *Ves.* 477. See also *Stackhouse* v. *Barnston*, 10 *Ves.* 453.

(*b*) *Mos.* 391.

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Estate to Debts by simple Contract, the Intention: in this Instance an Intention most absurd, rash, and destructive to the Estate; declaring openly, that his Executor is not to set up the Statute against any Demand incurred by simple Contract during his whole Life; inviting stale Demands. His Meaning must be taken to be only what shall turn out to be his just Debts. There is no Direction for any Inquiry, as to the Amount, Nature, Reality, Extent, or whether there had been any Payment. The Executor is not directed expressly to plead the Statute: nor is there any Implication of such Intention: but it is to take the ordinary Course; his Debts are to be discharged: but the Investigation of them is left to the Executor under the Direction of the Courts of Law and Equity. If a Devise of this Kind can have the Effect contended, the Statute would be a Snare to those, who, relying on it, might after six Years destroy their Vouchers. The Notion, that these are comprehended under the Description "just "Debts," as still subsisting in *foro Conscientiæ*, is *Petitio Principii*. The Statute, which was made for the Benefit of those, who may have paid, but have not the Means of proving it, upon general Principles, for the Quiet and Peace of Mankind, does not permit a Demand of Debt beyond its Limits to be inforced upon the Possibility, that it may still be undischarged. The plain Line is, that the Testator intends the Courts of Law and Equity to determine, what are just Debts; leaving his Executor at liberty to use all Means of Resistance, prescribed or allowed by the Law: thus encouraging Provisions for Creditors by the Assurance of a Protection to the Assets against Demands, which the Testator himself could have resisted; who, relying on the Statute, may have destroyed his Vouchers.

The Conclusion is, that this Doctrine, standing upon an unnatural Conjecture as to the Intention, pregnant with Danger

Danger and Injury, by inviting stale Demands, and discouraging Provisions for the Payment of Debts, ought not, unless established by Authority, to stand as the Rule; and I have endeavoured to shew, that there is no Decision, that a Devise for the Payment of Debts has the Effect of reviving Debts barred by the Statute before the Death of the Devisor: but they are left open to Examination by all the Means, which the Rules of Law and Equity admit.

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The Exceptions were over-ruled.

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After Order to dissolve Injunction *Nisi* on the Answer, a Reference for Impertinence being obtained, the Impertinence expunged, and afterwards Exceptions disallowed, Injunction dissolved on Motion in the first Instance without an Order *Nisi*.

AN Injunction, upon a Bill filed in *November*, 1811, restraining Proceedings in an Action for Goods sold and delivered, was by Order, dated the 16th of *December*, 1811, extended to stay Trial. The Answer was put in on the 4th of *May*, 1812; and on the 5th an Order was obtained to dissolve the Injunction, unless Cause should be shewn. On the 12th, the Day for shewing Cause, the Answer was referred for Impertinence; and, being reported impertinent, by Order, dated the 9th of *June*, the Impertinence was expunged; and the Costs taxed. The Plaintiff then took Exceptions; obtaining an Order, dated the 10th of *July*, 1812, to file them *nunc pro tunc*. The Master's Report, dated the 18th of *July*, disallowed those Exceptions; and in *November*, 1813, Exceptions to the Master's Report were over-ruled.

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Under these Circumstances a Motion was made by the Defendant, that the Injunction may be absolutely dis- . .

Sir *Samuel Romilly*, and Mr. *Phillimore*, in support of the Motion, maintained, that this Practice was regular: the Reason of the Order *Nisi*, that the Plaintiff may have an Opportunity of looking into the Answer, and considering, whether he will take Exceptions, or shew Cause upon the Merits, failing entirely, where Exceptions have been taken; which removes all Necessity for an Order *Nisi*.

Mr. *Leach*, for the Plaintiff, contended, that this Motion for dissolving the Injunction absolutely, in the first Instance, was irregular: the Foundation of the Order *Nisi* being, not merely that the Plaintiff may have the Opportunity of electing to take Exceptions, or shew Cause upon the Merits, but that he may have Time, generally.

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If any Authority can be cited, in which the Court has ruled, that this Application, under Circumstances so peculiar, is irregular, I would not upon any Notion of my own interfere against that Opinion, so supported; but, if no Authority can be produced, every Reason, that sustains the ordinary Practice, contradicts the Notion, that this Practice is irregular.

Ground of the Motion to dissolve Injunction *Nisi*, that the Plaintiff may determine whether to shew Cause upon the Merits or by Exceptions.

My Idea of the Practice is this. When an Order *Nisi* to dissolve an Injunction has been obtained upon the Answer's coming in, the Defendant shall not immediately move upon the Answer without giving the Plaintiff sufficient Time to look into it; as he ought to have an Opportunity of knowing, whether it is sufficient; and upon seeing the Answer he determines, whether he shall meet the Order *Nisi* upon the Merits, or by shewing Exceptions for Cause.

Cause. If he takes the latter Course, and cannot maintain the Exceptions, there is no Cause shewn; and the Injunction is gone: if he shews Cause upon the Merits, the Course that takes is obvious. I take the Practice to be founded upon the Justice, that the Party should have his Choice of two Modes of meeting the Order *Nisi*, and Time for that Purpose. This Plaintiff, instead of shewing a Reference of the Answer for Impertinence for Cause, which could not be, the Order of Reference not then existing, moved for that Reference; which was granted of Course; and then the Order *Nisi* was gone of Course: that Reference putting an End to all Application to dissolve the Injunction. After the Determination of that Reference they moved to refer the Answer for Insufficiency: which they could not do, until the former Reference was determined (*a*). The Court decided, that the Answer was sufficient; and under these Circumstances the Question is, whether it is necessary again to obtain the Order *Nisi*; or whether the Defendant may move to dissolve the Injunction in the first Instance. The very Ground of the original Proceeding, requiring the Order *Nisi*, is, that the Party may have that Information, which under these Circumstances it is plain he must have had, when he made his Application upon the Merits. He has nothing to state but what he must have known, when he saw the Answer, and moved to refer it for Impertinence, and afterwards, when he took Exceptions. That Answer, being finally deemed sufficient, must be considered just the same as when the Application was made; and therefore it was right, that the Plaintiff should shew Cause upon the Merits. If no Authority can be found, and the Case is new, this is my clear Opinion upon the Practice.

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No Reference for Insufficiency until Reference for Impertinence determined.

The Injunction was dissolved.

(*a*) See *Goodinge* v. *Woodhams*, 14 *Ves.* 534.

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Dec. 3. 6.

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Money, produced by the Sale of real Estate, bequeathed for charitable Purposes, a resulting Trust for the Heir.

Executors, having equal Legacies for their Care and Trouble, Trustees of the Residue for the next of Kin.

Residuary Bequest to Trustees and Executors, described both by their Character and Names, to be disposed of to such Person and Persons, and in such Manner and Form, and in such Sum and Sums of Money, as they in their Discretion shall think proper and expedient, an absolute Interest to them beneficially; or an absolute Power of Appointment; excluding the next of Kin, and the Heir as to the Produce of real Estate.

ANN *Clarke*, by her Will, dated the 12th of *December*, 1809, having given to her Executors, her Household Goods, Watches, Trinkets, Plate, and wearing Apparel, to be disposed of to such Persons and in such Proportions, as they, or the Survivor of them, should in their or his Discretion think proper, devised and bequeathed her Freehold, Copyhold, and personal, Estate, to *Henry* and *James Rumsey*, their Heirs, Executors, Administrators, and Assigns, upon Trust to sell; and out of the Money to arise by such Sale, together with all her ready Money, &c. and all other her Estate and Effects, she bequeathed several Legacies; and among them £100 to each of her Trustees for their Care and Trouble; and, giving all her Books to *Henry Rumsey*, to be retained by him, and divided amongst such of her Friends as he should think proper, proceeded thus:

"I give and bequeath all the Rest and Residue of the "Monies arising from the Sale of my said Estates, and "all the Residue of my personal Estate after Payment of "my Debts, Legacies, and Funeral Expences, and the "Expences of proving this my Will, unto my said Trus-"tees and Executors (the said *Henry Rumsey* and *James* "*Rumsey*), to be disposed of unto such Person and Per-

(1) On resulting Trust, see *ante*, *Hill* v. *Cock*, Vol. 1, 173, and the Cases referred to in the Notes.

"sons and in such Manner and Form and in such Sum "and Sums of Money as they in their Discretion shall "think proper and expedient. And I do hereby declare "my Will and Mind to be, that in case my said Freehold "Copyhold and Leasehold and personal Estates herein-"before mentioned shall fall short or not be sufficient for "Payment of all the said several Legacies and Bequests "Sum and Sums of Money by me hereby given and be-"queathed that what shall fall short shall be propor-"tionably abated out of each Legacy or Sum of Money "hereby given and bequeathed." And she appointed *Henry* and *James Rumsey* her Executors.

The personal Estate being insufficient to pay the Debts, the real Estate had been sold; and the Questions were; 1st, Whether the Executors, or the Heir at Law, or the next of Kin, of the Testatrix, were entitled to a Sum of £1095 : 8*s* : 4*d*.; the Surplus, arising from the Sale of the real Estate: 2dly, Who was entitled to the Sum of £530, the Amount of the charitable Legacies, admitted to be void by the Statute (*a*).

Mr. *Leach*, and Mr. *Cullen*, for the Heir at Law, contended, that this could not be distinguished from *Morice* v. *The Bishop of Durham* (*b*); the residuary Clause creating a Trust, the Subject, being the Produce of real Estate, must, according to *Ackroyd* v. *Smithson* (*c*), belong to the Heir.

Mr. *Roupell*, for the next of Kin, observing that the Executors throughout this Will are clothed with the Character of Trustees, argued, that the Residue was per-

(*a*) Stat. 9 *Geo*. 2. c. 36. 522.
(*b*) 9 *Ves*. 399. 10 *Ves*. (*c*) 1 *Bro*. C. C. 503.

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sonal Estate; that there was a partial Intestacy; and therefore the next of Kin were entitled, according to the Statute of Distribution.

Mr. *Richards*, and Mr. *Stephen*, for the Executors.

The Case of *Morice* v. *The Bishop of Durham* was clearly a Trust; and the Bishop in his Answer disclaimed any beneficial Interest. These Defendants are Trustees for the specific Object alone of paying the Debts and Legacies. In Effect the Residue is absolutely given to them. The Term "Discretion" imports merely such Disposition as they themselves shall think fit: excluding the Discretion of any other Person. Considered as a Power, it may be exercised in their own Favor; and, if not exercised, the Property belongs to them; in either Way excluding both the Heir at Law and the next of Kin. This is not to be distinguished from the Case in *Roll.* (*a*), a Devise to *B.* to dispose of at his Will, and Pleasure; which Words pass a Fee (*b*). A general Power of Disposition implies the absolute Interest; as necessary to the Exercise of the Power. The Word "Trustees" in the residuary Clause is merely *Descriptio personarum*, not of their Character. In Principle this Case is analogous to *Rogers* v. *Rogers* (*c*), and *Dormer* v. *Bertie* (*d*).

The MASTER *of the* ROLLS.

Dec. 6. It is clear, that such Part of the real Estate as is given to charitable Purposes, belongs to the Heir at Law; and does not go either to the next of Kin or the residuary Le-

(*a*) 1 *Roll.* 834. l. 12. *R.* Title Devise, (N. 4.) *Mo.* 57. *Bend.* pl. 9.
(*b*) *Vide Comyns*'s Digest,
(*c*) 3 *P. Wms.* 193.
(*d*) Pr. Ch. 94.

gatee.

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If a Trust is imposed, the Trustee cannot take beneficially; though the Trust may be too indefinite for Execution.

gatee. The Question then is as to what is not otherwise disposed of than by the residuary Clause; which turns upon the Point, whether there is any Trust imposed by that Clause: if there is, they cannot take beneficially, though the Trust may be of so indefinite a Nature, that the Court cannot carry it into Execution. This Testatrix, having created a Trust to sell, gives many particular Legacies; and among them £100 to each of her two Trustees for their Care and Trouble in the Execution of the Trusts of the Will. That is undoubtedly sufficient to exclude any Claim as Executors (a): but they claim, not in that Character, but under a direct Disposition to them as residuary Legatees. The first Words of the residuary Clause amount clearly to an absolute Gift to them; as the mere Circumstance of giving them the Description of Trustees and Executors cannot make them Trustees as to that Part of her Property, expressly bequeathed to them. Then do the subsequent Words import Trust? The Testatrix has very frequently in the Course of her Will used the Words "in Trust:" but those Words are not introduced here: "to be disposed of unto such Person and "Persons, and in such Manner and Form, and in such "Sum and Sums of Money, as they in their Discretion "shall think proper and expedient."

I see nothing here but a purely arbitrary Power of Disposition according to a Discretion, which no Court can either direct or control. It is not to be contended, that, if the Words were "to be disposed of according to their "Discretion," that would have qualified the preceding Gift: then the Effect must be produced, if at all, by the interposed Words, "to such Person or Persons, and

(a) *Langham* v. *Sandford*, 17 *Ves.* 435, and the References in the Note (a), 443.

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"in such Manner and Form, and in such Sum and Sums "of Money:" but those are Words perpetually occurring in general Powers of Appointment; and it was never conceived, that such Words, instead of conferring a Power, raised a Trust. If that were so, there would be no such Thing as good general Powers of Appointment. They would be all void Trusts; for, if Trusts at all, they must be void from the Uncertainty of the Objects.

Distinction between express Trust for an indefinite Purpose, and where from the indefinite Nature of the Purpose the Court concludes, that a proper Trust could not be intended; though the Words import Trust. The Principle of the latter Case not applied to express Trust.

In the Case of *Morice* v. *The Bishop of Durham* (a) there was an express Trust to pay Debts and Legacies, and dispose of the Residue, as therein mentioned; and that was treated by the *Lord Chancellor*, as it had been here, as a Case of express Trust; and the *Lord Chancellor* very clearly states the Distinction between express Trust for an indefinite Purpose and those Cases, where from the indefinite Nature of the Purpose the Court concludes, that a proper Trust could not be intended: though Words may have been used, which, had the Objects been definite, would by Construction import a Trust. His Lordship observes (b), that the Principle of Cases of the latter Description has never been held in this Court applicable to a Case, where the Testator himself has expressly said, he gives his Property upon Trust.

Supposing this Testatrix after this Gift to the Executors had requested them to give the Residue to such Persons and in such Manner as they may think proper and expedient, there would have been no Trust notwithstanding the Words on account of the Uncertainty of the Object. It is said, the Testatrix meant the Executors, to give this Property to somebody, and not to enjoy it themselves: but that might be said in every Case of a Bequest to give

(a) 9 *Ves.* 399. 10 *Ves.* 522. (b) 10 *Ves.* 537.

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to Objects not distinctly specified, and in every Case of a general Power of Appointment. It would be necessary to shew, that these Executors, not only cannot enjoy it themselves, but have no Right to appoint it to others, as, whether they have the absolute Property, or only a Power to appoint the Residue, still the Claim of the Heir or next of Kin is premature, until it shall be seen, whether any Appointment will be made. It was insinuated in the Argument, that this was probably a secret Trust for Charity. If that were so, it would be void: but there is nothing in the Case, entitling me to form such a Conclusion. Therefore neither the Heir nor the next of Kin have a Right to call upon the Executors to account for this Residue.

1813, *Nov.* 4. *Dec.* 24. (15 *Ves.* 10.)

WATERS *v.* TAYLOR.

Partnership in the Opera House, dissolved by the Conduct of the Parties, making it impossible to carry it on upon the Terms stipulated.

Decree accordingly for a Sale of the whole Concern; restraining the managing Partner from acting; with liberty to either Party to lay Proposals before the Master for Management until the Sale.

THIS Cause (*a*) coming on to be heard, the Plaintiff prayed a Decree of Foreclosure of the Mortgagee: a Dissolution of the Partnership: an Account of the Transactions, and particularly the Receipts and Payments, of the Defendant *Taylor:* an Injunction, restraining him from receiving any Part of the Income, and interfering in the Concerns of the Opera House; and a Direction to the Master to consider of a Scheme for the Sale of the joint Property or for the future Management.

(*a*) See the Case stated in the Report upon the Motion, 15 *Ves.* 10.

The

1813. WATERS v. TAYLOR.

The Defendant *Taylor*, by his Answer claiming as a Creditor upon the Result of the Account, insisted on a Lien upon the Plaintiff's Share for the Balance, that should appear to be due.

Sir *Arthur Piggott*, Mr. *Fonblanque*, Mr. *Hart*, and Mr. *Johnson*, for the Plaintiff. Mr. *Richards*, Sir *Samuel Romilly*, Mr. *Leach*, Mr. *Wetherell*, and Mr. *Shadwell*, for the Defendant *Taylor*.

For the Plaintiff it was insisted, that if he was entitled to a Decree, dissolving the Partnership, the Court in directing the future Management was not bound to the particular Stipulations of the Contract; but would consult the Benefit of the Parties.

Upon the Question as to the Dissolution of Partnership *Sayer* v. *Bennett* (*a*), and *Adams* v. *Liardet* (*b*), were cited. In the former, upon the Insanity of a Partner, an Inquiry was directed, whether he was in such a State of Mind as to be capable of conducting the Business: but the Result does not appear.

The Lord CHANCELLOR in the Course of the Argument inquired, how the Sheriff executes the Writ under a Judgment against one Partner, according to the present Doctrine of Courts of Law, that he takes the Interest of the Partner; and in some Way, (it is not very clear, how) they take an Account of all the Concerns; and the Creditor sells the Interest of the Partner. Is not that a Dissolution of the Partnership?

(*a*) Before Lord *Kenyon*, at the Rolls, *Wats.* Part. 382.

(*b*) From a MS. of Sir *Samuel Romilly*, before Lord *Thurlow*.

Mr.

Mr. *Cooke* (*Amicus Curiæ*) said, the Way, in which the Sheriff executes the Writ in Practice, is by making a Bill of Sale of the actual Interest. *Scott* v. *Scholey* (*a*) was mentioned as to the proper Subject of legal Execution.

The Lord CHANCELLOR.

Execution at Law under a Judgment against a Partner formerly by seizing the joint Effects, and selling the undivided Share: now by selling the actual Interest: how to be ascertained except in a Court of Equity, *Quære.*

If the Courts of Law have followed Courts of Equity in giving Execution against Partnership Effects, I desire to have it understood, that they do not appear to me to adhere to the Principle, when they suppose, that the Interest can be sold, before it has been ascertained, what is the Subject of Sale and Purchase. According to the old Law (1), I mean before Lord *Mansfield's* Time, the Sheriff under an Execution against Partnership Effects took the undivided Share of the Debtor, without Reference to the Partnership Account: but a Court of Equity would have set that right by taking the Account, and ascertaining what the Sheriff ought to have sold: the Courts of Law however have now repeatedly laid down (*b*), that they will sell the actual Interest of the Partner, professing to execute the Equities between the Parties; but forgetting, that a Court of Equity ascertained previously what was to be sold. How could a Court of Law ascertain, what was the Interest to be sold, and what the Equities; depending upon an Account of all the Concerns of the Partners for Years?

By the express Contract of these Parties, which is the Basis of this Concern, whether a Partnership, or to be described by any other Denomination, *Taylor* was Manager, subject to all the Engagements, to which *Gould* had been subject. Whether this is a Partnership,

(*a*) 8 *East.* 467.

(*b*) *Barhurst* v. *Clinkard*, 1 *Show.* 173. *Eddie* v. *Davidson*, *Doug.* 650.

(1) 16 *Vin. Ab.* 242, 243, &c.

which

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which might be dissolved by filing the Bill, which it is perhaps difficult to maintain, or, for a Term of Years, or, as was contended in the Case (*a*) of the Theatre on the other Side of the *Haymarket*, without Limits, as long as Renewals could be obtained, is not extremely material in the View the Court is obliged to take of this Case.

The Case alledged, is, that all these Engagements have been violated from Day to Day; that Performers have been employed without mutual Consent; that this has been the Habit; and may be persevered in: so, as to the nightly Receipt of the Money; which, it is represented, being either left in a particular Place, or paid to an Agent, has in some Way got to the Disposition of *Taylor*; and the Attempt of this Court to put an End to that has been rendered ineffectual by a Slip in the Terms of the Injunction: a Circumstance which I cannot regard; as the Effect is, that the Parties were under no Prohibition. There is hardly one Covenant, which has not been violated. It is said, the Remedy is by repeated Actions of Covenant; and it is supposed, that Juries may have Feelings of Vengeance, that may subject Mr. *Taylor* to such Damages as may produce the full Object of the Plaintiff: but a Court of Equity has Power to restrain and injoin: a Power in many Instances recognised by the Law, as resting on that very Circumstance, that without such Interposition the Party can do nothing but repeatedly resort to Law; and, when that has proceeded to such an Extent as to become vexatious, for that very Reason the Jurisdiction of a Court of Equity attaches.

Jurisdiction by Injunction upon the Ground of Vexation by repeated Actions of Covenant.

It was supposed, that I had contradicted Lord *Kenyon*'s Doctrine in *Sayer* v. *Bennett* (1). Certainly I did not con-

(*a*) *Morris* v. *Colman.*

(1) *Wats.* on Partnership, 382. 1 *Cox.* 107.

tradict

tradict that Doctrine: nor did I make any Decree, which, duly considered, was an Assent to it. The Case was no more than this: one Partner becoming a Lunatic, the others thought proper by their own Act to put an End to the Partnership; which they had no Right to do, if he had been sane; and they continued to carry on the Business with his Capital; not being able to state, what was his, as a Creditor, and what was not his, as a Partner (*a*). That Lord *Kenyon* thought afforded a sufficient Ground for saying, the Partnership was not determined; and he also held, that one Partner cannot on Account of the Lunacy of another put an End to the Partnership; but that Object must be attained through the Decree of a Court of Equity.

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Dissolution of Partnership on the Lunacy of a Partner, if to be obtained, only by Decree: not by the Act of the Survivors: not determined where they had carried on the Business with his Capital.

My Decision was not intended either to support or impeach that; proceeding upon the particular Circumstances of the Case before me. The Question whether Lunacy is to be considered a Dissolution, is not before me (1). I shall therefore say no more upon it than this. If a Case had arisen, in which it was clearly established, as far as human Testimony can establish, that the Party was what is called an incurable Lunatic, and he had by the Articles contracted to be always actively engaged in the Partnership, and it was therefore as clear as human Testimony can make it, that he could not perform his Contract, there could be no Damages for the Breach in consequence of the Act of God: but it would be very difficult for a Court of Equity to hold one Man to his Contract, when it was perfectly clear, that the other could not execute his Part of it. It will be quite Time enough to determine that Case when it shall arise; for, as we know, that no Lunacy can be pronounced incurable, yet the Duration of the

How far the Lunacy of a Partner is a Ground of Dissolution, depending on the Degree and probable Duration of the Disorder, affecting the Capacity to fulfil his Contract, *Quære.*

(*a*) *Crawshay* v. *Collins*, 15 *Ves.* 218. *Featherstonhaugh* v. *Fenwick*, 17 *Ves.* 298.

(1) *Huddleson's* Case, cited 2 *Ves.* sen. 34.

Disorder

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Disorder may be long or short; and the Degree may admit of great Variety. I would not therefore lay down any general Rule by Anticipation, speculating upon such Circumstances. I agree with Lord *Thurlow*, that the Jurisdiction is most difficult and delicate, and to be exercised with great Caution.

The real Question here is quite different from *Adams* v. *Liardet;* which I take to be that, in which Lord *Thurlow*'s Opinion was expressed. This Question is, whether from the Acts of *Taylor* himself it is not manifest, that this Partnership cannot be carried on upon the Terms, for which the Parties engaged: whether a single Act has been done by him of late, that is not Evidence on his Part, that he can no longer himself be bound by his Contract, so as to observe the Terms of it; when he excludes himself from the Concern and the Partnership, as far as it is to be conducted upon the Terms, on which it was formed; and says, he will carry it on upon other Terms. Taking that to be his Conduct, this comes to the common Case of one Partner excluding the other from the Concern; as, if one will not, because he cannot, continue it upon the Terms, on which it was formed, the Consequence must be, that he says, his Partner shall not, because he cannot, carry it on upon those Terms.

That is the true Amount of this Case. The one cannot engage a Performer without the other's Consent; having entered into Stipulations only with reference to Agreement, they have given me no Means of extricating them from the Difficulties arising from Non-agreement. Suppose an Opera at this Time requires more than £300 *per* Week, or a new Exhibition more than £500, if the Plaintiff differs upon that, what is a Judge to do but to look at the Contract, as the only Thing the Court can act upon: and

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and if both Parties agree, that the Contract cannot be acted on, that furnishes the Means of saying, there is an End of it; and their Interests are to be regarded as if no such Contract had existed. The Parties, by Consent, determine, that there is an End of the Concern, which cannot be carried on upon the Terms stipulated; and the Court cannot substitute another Contract.

In this View of the Case, my Opinion is, that this Contract is determined; and the Parties must be treated accordingly (1). The Decree as to the Mortgage, &c. is of Course: but another View of the Case arises from the Answer of *Taylor*, claiming as a Creditor upon the Accounts; and that the Court, regarding this as Partnership Property, shall give him a Lien upon the Plaintiff's Share for the Balance, that may be due on the Account. Upon the same Principle then, if the Plaintiff shall appear to be a Creditor, has not he a Right to have *Taylor*'s Share sold; and then is the Court, winding up the Concern, to sell the Share of one, and not the whole joint Property? Each has an Interest to have the whole sold; which will sell much better than the Shares, especially if unliquidated.

The most difficult Question is that, as to the Appointment of a Manager in the Interval between the Decree and the Sale. This joint Concern ought to be brought to Sale, if at all, upon the Principles I have mentioned; placing them in the State, in which they would be, if without any Stipulation for Management they were respectively Owners of given undivided Shares. They agree upon given Principles and prescribed Terms for the Management; which can no longer be carried on upon those Principles and Terms; and the Question is, whether the Court can impose a Manager before the Sale, not upon

(1) *Baring* v. *Dix*, 1 *Cox*. 213.

 the

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the prescribed Terms, but on such as may be adviseable for all the Parties concerned. With an Inclination, that I shall have great Difficulty to make that a Part of the Decree without some previous Inquiry, I reserve for farther Consideration that difficult and material Question; having expressed my Opinion upon the rest of the Case; in a Word, that these Parties have themselves dissolved this joint Concern: as their Conduct shews, that they cannot carry it on upon the Terms stipulated.

Dec. 24.

The Minutes, as corrected by the *Lord Chancellor*, declared, that the Defendant *Taylor* was not entitled to act as Manager until a Sale; and that, if the Master's Opinion should be, that the Property could not be immediately sold, either Party was to be at liberty to lay Proposals before him for the Management until a Sale.

ROLLS. 1813. *Dec.* 16, 17.

GRANT *v.* MILLS (1).

Vendor's Lien on the Estate for the Purchase Money not discharged by taking Bills of Exchange; which are to be considered, not as a Security, but as a Mode of Payment.

JOHN *Ogle* having entered into an Agreement to purchase a Freehold Estate from the Plaintiff, by Indentures of Lease and Release, dated the 20th and 21st of *April*, 1804, in consideration of £3500 by *Ogle* paid as therein mentioned, the Estate was conveyed to *Ogle* in Fee: the Sum of £3500 the Consideration, stated to be paid by *Ogle*, was not paid otherwise than by Bills to that Amount, drawn by *Ogle* at different Dates, and accepted by him and his Partner *Walton*; payable to the Plaintiff's Order. *Ogle* soon afterwards sold the Estate for £3500 to the Defendant *Mills*: but of that Sum only £1199 had

(1) 16 *Ves.* 278. *Ex parte* 346.—*Blackburne* v. *Gregson*, *Loaring*, 2 *Rose*'s Bkp. Ca. 79. 1 *Cox*. 90. *Ex parte Peake*, 1 *Madd.*

been paid by him on the 1st of *June;* when *Ogle* and *Walton* became Bankrupts.

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The Bill, insisting, that under these Circumstances, the Plaintiff was entitled to the Sum of £2301, remaining unpaid by *Mills*, with Interest at 5 *per Cent.* prayed a Declaration accordingly; or otherwise that the same might be applied by *Mills* towards Payment of the Bills of Exchange.

Sir *Samuel Romilly*, and Mr. *Roupell*, for the Plaintiff.

Under the Circumstances of this Case the Plaintiff has a clear Lien upon the Purchase Money, remaining unpaid in the Hands of *Mills*; who is a mere Stake-holder; bound by Notice at any Time before the Contract, and therefore before all the Money has been paid. The mere Fact of an additional Security taken is not conclusive, that the Lien is given up; unless taken with that Intention for the Purpose of exonerating the Estate. There is a wide Distinction between a Mortgage, particularly of a Part of the same Estate, and a mere personal Security, in this Instance Bills accepted by the Purchaser and his Partner, and dishonoured, when due. This Subject and the various Authorities were much considered in *Nairn* v. *Prowse* (*a*), and *Simmons* v. *Mackreth* (*b*).

Mr. *Hart*, Mr. *Leach*, and Mr. *Wear*, for the Defendants, the Assignees under the Commission.

It cannot be admitted, that a personal Security, taken by the Vendor of an Estate, does not discharge the Lien:

(*a*) 6 *Ves.* 752. (*b*) 15 *Ves.* 329.

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Bond v. *Kent* (*a*), *Fawell* v. *Heelis* (*b*): the latter Case, though questioned in *Blackburn* v. *Gregson* (*c*), not being overruled. The Principle is correctly stated in *Nairn* v. *Prowse*; that a personal Security taken, though not of Necessity a Substitution for the Lien, is so, if totally distinct and independent; as it was in that Instance; a new Security taken by a Pledge of Stock. This falls within that Principle; being, not merely the personal Security of the Purchaser, but Bills, drawn upon and accepted by the House, in which he was a Partner: a new Security; and a Substitution of additional and different Credit.

Mr. *Owen*, for the Defendant *Mills*, contended, that the Agreement to take Bills instead of Money was *primâ facie* a Substitution; that there was no Privity between the Plaintiff and *Mills*; and that the Relief, to which the Plaintiff was entitled, to prevent the Assignees from receiving and distributing the Remainder of the Purchase Money might have been obtained by Petition under the Bankruptcy.

Sir *Samuel Romilly*, in Reply.

The additional Security, if it can be ascribed to any other Motive than the Intention to relinquish the Lien, will not have that Effect. The Reason for taking these Bills may be presumed to have been the Convenience of the Purchaser; giving him the Opportunity of paying by Instalments: the Bills being at different Dates. Certainly there is no Evidence of that Motive. The Assignees are in the Situation of the Bankrupt *Ogle*: could he have taken this Money; and refused to pay any Part to the original Owner of the Estate?

(*a*) 2 *Vern.* 281. Ed. 3. 422, n. 2 *Dick.* 425.
(*b*) *Amb.* 724. 1 *Bro.* C. C. (*c*) 1 *Bro.* C. C. 420.

The

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The MASTER *of the* ROLLS asked, whether there was any Case of a Security given by a third Party.

It was admitted at the Bar, that there was no such Case.

The MASTER *of the* ROLLS.

Dec. 17.

Assignees subject to Equities as the Bankrupt.

The general Doctrine respecting the Lien of a Vendor for his Purchase Money is not disputed in this Case: neither is it disputed, that whatever Equity the Plaintiff would be entitled to against *Ogle* he is entitled to against the Assignees. As to the Defendant *Mills* it can hardly be said, that any adverse Equity is sought against him. He has paid nothing, since he had Notice; and it is indifferent to him, to whom he is to pay what remains due from him. The only Question is, whether the Plaintiff has parted with that Lien, which, unless it has been parted with, every Vendor has for the Price of his Estate. It is said, that, by taking Bills, accepted by the Partnership, in which the Purchaser was a Partner, the Vendor has got the Security of a third Person; viz. the other Partner; which must be considered as a Substitution for the Lien. What may be the Effect of a Security, properly so denominated, of a third Person, has never, I believe, been absolutely determined: but I perfectly concur in the Opinion, expressed by Lord *Redesdale* in *Hughes* v. *Kearney* (a), that Bills of Exchange are to be considered, not as a Security, but merely as a Mode of Payment. That is obvious from attending to the Nature of a Bill of Exchange: it is an Order by the Drawer for the Payment of Money, which he has in the Hands of the Drawee, to the Holder of that Bill. The Acceptor by his Acceptance acknowledges, that he has Money belonging to the Drawer, in his Hands;

As to the Effects of a Security of a third Person upon the Vendor's Lien on the Estate for the Purchase Money, *Quære.* Acceptor of a Bill considered as a Debtor, not a Surety.

(a) 1 *Sch.* and *Lefroy*, 132. See 136.

and

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and engages to have that Money forthcoming according to the Requisition of the Bill. The Acceptor is never considered as a Surety for the Debt of another. By accepting he admits himself to be a Debtor to the Drawer. The Subject of the Bill is in Contemplation of Law the Drawer's own Money, which he authorizes the Creditor to receive, instead of receiving it himself, and afterwards handing it over to such Creditor. My Opinion is clearly, that there is no Waiver of the Lien by taking Bills; and therefore the Plaintiff is entitled to whatever Part of the Purchase Money remains in the Hands of *Mills*. If there is any Dispute as to the Amount, it must be ascertained by a Reference to the Master.

DONE *v.* READ.

1813, *Nov.* 10.

Joint and several Answer including in the Title Persons, who declined joining in it, ordered to be received as the Answer of those, who swore it, without striking out the Names.

A JOINT and several Answer was taken by Commission; in the Title to which the Names of *John Done* and *Maria* his Wife appeared; who declined joining therein; and put in a joint Answer with other Defendants.

Mr. *Lyon* moved, that the Names of the Defendants *Done* and his Wife may be struck out from the Title of the Engrossment of the Answer, which they refused to swear.

The Plaintiff consented to the Motion.

Mr. *Hart* (as *Amicus Curiæ*) suggested, that the Course is, that the Answer should be received, as the Answer of those who swore it.

The VICE-CHANCELLOR made the Order accordingly (1).

(1) See *Cooke* v. *Westall*, 1 *Madd.* 265.

PEAKE v. PENLINGTON.

1813, *Nov.* 27.

Powers of Sale and Exchange, inserted in a Settlement under a Clause in Articles for all usual Powers.

THE Question in this Cause turned entirely on the Construction of the following Clause, contained in Marriage Articles preparatory to a Settlement.

"And it is hereby declared and agreed between the " Parties hereto that in the said Settlement shall be contained a Power for the said *James Penlington* and " *Anna Maria* and the Survivor of them to appoint new " Trustees and also all such other Powers and Provisoes " for effectuating the Intentions of the said Parties as are " usually contained in Settlements of the like Nature as " shall be approved of by the said *Richard Peake* and " *James Earnshaw* (the Trustees) or the Survivor of " them his Heirs Executors Administrators or Assigns."

The Question was, whether Powers of Sale and Exchange should be inserted in the Settlement.

Mr. *Roupell*, for the Plaintiff.

Mr. *Wyatt*, for the Defendant.

Powers of selling, exchanging, and investing in new Purchases, usual.

The Lord CHANCELLOR declared his Opinion to be that Powers of selling, exchanging, and investing in new Purchases, are usual in Settlements; and therefore Powers of Sale, and Exchange, came within the Meaning of this Clause; and ought to be inserted in the Settlement.

PRESTON, *Ex parte* (1).

1813, *Nov.* 30.

Denial on a *Sunday* not an Act of Bankruptcy.

THIS Petition was presented by a Bankrupt to supersede the Commission, on the Ground, that no Act of Bankruptcy had been committed.

(1) 2 *Rose*'s Bkpt. Ca. 21.

1813.
PRESTON, *Ex parte.*

The Affidavit in support of the Petition stated, that on *Monday* the 3d of *May* last, the Petitioner told one of his Creditors, *Popple*, that if he, *Popple*, would go to the House of the Petitioner to dine either on *Sunday* or *Monday* following, the 9th or 10th of *May*, he would settle the Account between them. On the other Side it was sworn, that the Bankrupt said to *Popple*; "If you will "come, and dine with me next *Sunday*, we will settle." On *Sunday*, the 9th, the Bankrupt said to his Servant, "If *Popple* comes To-day tell him I am gone out to Din-"ner." *Popple* afterwards called; and was accordingly denied by the Servant; who, after he was gone, went into the Room to her Master; and told him what had passed.

Sir *Samuel Romilly*, and Mr. *Barber*, in support of the Petition.

Mr. *Hart*, for the petitioning Creditor.

The Lord CHANCELLOR intimated his Opinion that this was not an Act of Bankruptcy, but said he would inquire, whether there was any Instance, in which such an Act had been held an Act of Bankruptcy.

The Lord CHANCELLOR.

The Act of Bankruptcy, on which this Commission is grounded, is a Denial to a Creditor on a *Sunday*. After the best Consideration my Opinion is, that, if the Petitioner did, according to the Representation of the petitioning Creditor, appoint *Sunday* for settling the Account, it is not an Act of Bankruptcy by him to say, he would not keep that Appointment to transact Business on that Day. On that Ground this Commission must be superseded at the Expence of the petitioning Creditor.

END OF THE SECOND PART.

CASES

IN

CHANCERY, &c.

1813, 53 *Geo.* 3.

MURRAY *v.* JONES.
FAWCETT *v.* JONES.

ROLLS.
1813,
July 19, 20. 26.

Construction of a residuary Clause, after a Bequest to the Testatrix's younger Children, "but in "case I shall "have but one "Child living "at the Time "of my De-"cease," or all but one die under twenty-one and unmarried, to another Family: not a Condition: established therefore in the Event of the Testatrix's Death, having never had a Child.

HENRIETTA Laura Pulteney, Baroness of *Bath*, by her Will, dated the 5th of *November*, 1794, reciting, that by Articles of Agreement, bearing Date the 23d of *July* preceding, previous to her Marriage with Sir *James Murray Pulteney*, all the real and personal Estate belonging to her (except as therein mentioned) were agreed to be conveyed, assigned, surrendered, and transferred, to Trustees, their Heirs, Executors, Administrators, and Assigns, upon Trust (among other Things) that they should execute such Grants and other Dispositions of the said real and personal Estate unto and to the Use and for the Benefit of such Person and Persons, and for such Estate and Estates and other Interests, and subject to such Powers, Conditions, &c. as she should by Deed or Will appoint, by virtue of the said Power reserved to her and of all other Powers, &c. appointed, that the

Trustees

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Trustees should assign and transfer all her personal Estate to her Executors, upon the Trusts after mentioned.

The Testatrix then, after making a Provision for the Payment of her Debts, as to two-third Parts of a Fund of £4434 : 4*s* : 2*d*. Three *per Cent. Consolidated Annuities*, appointed, subject to the existing Trusts, that the Trustees should pay the Dividends to the separate Use of *Elizabeth Evelyn Markham* for Life; and after her Decease transfer the Capital among her Children, equally, subject to her Appointment, or to her only Child, and the remaining third to two other Persons equally; and, in case of the Decease of either or both, upon the same Trust, for the Benefit of Mrs. *Markham* and her Issue, as the other two-thirds.

The Testatrix farther directed her Executors to permit Sir *William Pulteney* to have the Use of all her Jewels and Trinkets, except those particularly disposed of, during his Life; and after his Decease, or, in case of his Death in her Life-time then after her Decease, to deliver them to her eldest or only Son, who shall be then living, for his own absolute Use and Disposal, upon his attaining the Age of twenty-one Years; and in case of his Death under that Age, then to her next eldest Son, who shall live to attain the Age of Twenty-one Years, upon his attaining such Age; and in case she shall leave no such Son, who shall live to attain the Age of Twenty-one Years, then to deliver and divide the several Jewels and Trinkets unto and amongst her Daughters, who shall be living at the Time of the Decease of the Survivor of her and the said Sir *William Pulteney*, in equal Proportions (if more than one); and if there shall be but one such Daughter, then to deliver the whole of such Jewels, &c. to such only Daughter, upon her or their respectively attaining the

Age

Age of Twenty-one Years or Marriage, which shall first happen; with Benefit of Survivorship; and in case she shall have no Daughter living at the Time of the Decease of Sir *William Pulteney*, or at the Time of her Decease in the Event of his Death in her Life-time, or being such all of them shall die under Age and without having been married, then to deliver the said Jewels, &c. to Mrs. *Markham*; or if she should be dead, to her Children equally, or her only Child.

The Testatrix, after some Legacies and Annuities, and a Direction to her Executors to deliver such of her Wearing Apparel as they thought proper to her Maid Servant, and the Residue to and among her (the Testatrix's) Children; and, in default of such Issue, to Mrs. *Markham*, directed her Executors to pay the Interest and Dividends of all the Residue of her personal Estate to her Father, and after his Decease to her Husband Sir *James Pulteney*; and after the Decease of the Survivor unto and among all and every her Daughters and younger Sons, equally; and if there shall be an eldest or only Son, and but one such Daughter or younger Son, then the Whole to such one Daughter or younger Son, at the Age of Twenty-one, or on the Marriage of Daughters; with Directions for Maintenance in the mean Time, and Survivorship, in case of Death, or a younger Son becoming an eldest or only Son. The Will then proceeded thus:

" But in case I shall have but one Child living at the " Time of my Decease be the same a Son or a Daugh- " ter or in case I shall have two or more Sons and no " Daughter or Daughters living at the Time of my De- " cease and all of them but one shall depart this Life un- " der the Age of Twenty-one Years or in case I shall have

" two

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" two or more Daughters and no Son or Sons living at " the Time of my Decease and all of them but one shall " depart this Life under the Age of twenty-one Years and " without having been married or in case I shall have " both Sons and Daughters and all but one being a Son " shall die under twenty-one Years or being a Daughter " shall die under that Age and unmarried," then in any of the said Cases she directed, that the Trustees should from and immediately after the Decease of the Survivor of Sir *William Pulteney* and Sir *James Pulteney*, stand possessed of and interested in the whole of the said Residue of her personal Estate, &c. upon the same Trusts, &c. for Mrs. *Markham* and her Issue as are before declared concerning the two-third Parts of the £4434:4*s*:2*d*. Bank 3 *per Cent*. Consolidated Annuities; with a Direction for the Maintenance of such Issue of Mrs. *Markham*, as aforesaid, until such Time as their respective Portions shall become payable, as she had before directed with respect to her own Daughters and younger Sons; and in case there shall not be any such Issue of Mrs. *Markham* living at the Time of her Decease, or, there being such Issue, if all and every of them shall depart this Life before they or any of them shall have acquired a vested Interest in the Residue, in Trust for the Testatrix's only or only surviving Son, as the Case may be, at his Age of twenty-one Years, or her only or only surviving Daughter, as the Case may be, at her Age of twenty-one Years, or upon the Day of her Marriage, unless in the Life-time of Sir *William* and Sir *James Pulteney*, or Mrs. *Markham*: in that Case to be paid or transferred within six Calendar Months next after the Decease of the Survivor; but in case she shall depart this Life without Issue, or leaving such, if all and every of them, being Daughters, shall depart this Life under the Age of twenty-one Years, not having been married, and all and every of them, being

Sons,

Sons, shall depart this Life under such Age, and in case there shall not be any such Issue of Mrs. *Markham* as aforesaid living at the Time of her Decease, or there being such Issue, if all and every of them shall depart this Life before they or any of them shall have acquired a vested Interest in the Residue, then in Trust for the Brothers and Sisters of Mrs. *Markham* then living equally; and if but one, for such only one.

The Question arose upon the Claim of Mrs. *Markham*, now Mrs. *Fawcett*, and her Children, under the residuary Clause in the Event of Lady *Bath's* Death having never had a Child.

Sir *Arthur Piggott*, Mr. *Richards*, and Mr. *Preston*, Mr. *Hart*, and Mr. *Treslove*, for the Plaintiffs, in the second Cause, Mrs. *Fawcett* and her Children, contended, that upon the whole of the Will the Limitation of the Residue to Mrs. *Fawcett* and her Family could be intercepted only by the preceding Limitation taking Effect; not depending on a Condition precedent; that the Testatrix did not mean to die intestate as to any Part of her personal Estate; that she clearly intended to postpone an only Child of her own to Mrs. *Fawcett* and her Family; and her Husband Sir *James Pulteney* was an Object of her particular Attention immediately after her Father.

Sir *Samuel Romilly*, Mr. *Leach*, and Mr. *Raithby*, for Sir *John Murray*, the personal Representative of Sir *James Pulteney*.

The following Cases were cited: *Jones* v. *Westcomb* (*a*), *Gulliver* v. *Wicket* (*b*), *Statham* v. *Bell* (*c*), *Doe* on the Demise

(*a*) 1 Eq. Ca. Abr. 245, pl. 10.
(*b*) 1 *Wils.* 105. See 3 *Burr.* 1644.
(*c*) *Cowp.* 40. 1 *Doug.* 66, Note 4, S. C.

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Will construed without Regard to the Instructions.

Demise of *Watson* v. *Shipphard* (*a*), *Doo* v. *Brabant* (*b*), *Meadows* v. *Parry* (*c*), *Fonnereau* v. *Fonnereau* (*d*), *Taylor* v. *Taylor* (*e*), *Calthorpe* v. *Gough* (*f*), and *White* v. *Barber* (*g*).

The MASTER *of the* ROLLS.

From the opening of this Case I collected, that there had been a Proceeding in the Ecclesiastical Court relative to some supposed Variance between the Will, as it stands, and the Instructions given for preparing it. If I knew what those Instructions were, it would be my Duty to construe the Will without the least Regard to them: but I am not in any Manner apprised of their Import: nor do I know in what Degree they would, if introduced into the Will, obviate any Difficulty in its Construction. Upon the Order of the Limitations in this Will there can be no Dispute. The Limitation to Mrs. *Markham*, now Mrs. *Fawcett*, and her Issue stands next in Succession after that to the younger Children of Lady *Bath*. Lady *Bath* had no younger Children: *primâ facie* therefore the Limitation to Mrs. *Fawcett* and her Issue is to take Effect. But it is said, that Limitation cannot take Effect; and consequently there is an Intestacy; because the Limitation to Mrs. *Fawcett* is preceded by, and made to depend upon, the Condition, that Lady *Bath* should have a Child or Children living at her Decease: Lady *Bath* never had a Child: the Condition therefore fails; and with it the Limitation, depending upon it, must likewise fail.

The Questions then are, 1st, Whether in Words any such Condition is to be found in this Will: 2dly, If in Words, then

(*a*) *Doug.* 75.
(*b*) 3 *Bro* C. C. 393.
(*c*) *Ante*, Vol. I. p. 124.
(*d*) 3 *Atk.* 315.
(*e*) 1 *Atk.* 386.
(*f*) 3 *Bro.* C. C. 395, Note.
(*g*) 5 *Burr.* 2703. See the Judgment in *Humberstone* v. *Stanton*, *ante*, Vol. I. p. 388.

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then whether the Intention was, that those Words should have the Effect of Condition. In my Opinion the first Case, put by Lady *Bath*, namely, that of her having but one Child living at her Death, does not contain a Condition, that she should have one Child living at that Time. At first sight a Proposition relative to the having but one Child may seem to include in it, and to imply, the having one. That is true, if the Proposition be affirmative; but by no Means necessarily so, if the Proposition be hypothetical or conditional. The Proposition that *A*. has but one Child, is as much an Assertion, that he has one, as that he has no more than one: but when the having but one is made the Condition, on which some particular Consequence is to depend, the Existence of one is not required for the Fulfilment of the Condition; unless the Consequence be relative to that one supposed Child. As if I say, that in case I have but one Child, it shall have a certain Portion, it is in the Nature of the Thing necessary, that the Child should exist to be entitled to the Portion: but, if I say, that, in case I shall have but one Child of my own, I will make a Provision for the Children of my Brother, it is quite clear, that my having one Child is no Part of the Condition, on which the supposed Consequence is to depend. My having one Child of my own would rather be an Obstacle than an Inducement to the making of a Provision for the Children of another Person. The Case I guard against is the having a Plurality of Children; and it is only the Existence of two or more that can constitute a Failure of the Condition, on which the intended Provision for my Brother's Children was to depend. The plain Sense of the Proposition is, that, unless I have more than one, the Provision shall be made.

It might have been apprehended, that Lady *Bath's* having one Child would prevent her from giving the Bulk of

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of her Fortune to the Children of Mrs. *Fawcett*. Lady *Bath* says, "No: supposing I have one Child, but if I "have but one Child, that is, unless I have more than "one, Mrs. *Fawcett's* Children shall take my residuary "Estate." It cannot be predicated, that Lady *Bath* had more than one: she had none. If the Subject admitted of Gradation, as it does not, it might be said, that the Condition, on which the Limitation to Mrs. *Fawcett* depended, was more than fulfilled. The Circumstance, that was to exclude her, was the Existence of more than one Child: there is not even one: there is consequently no Approximation towards that, which would have occasioned a Failure of the Provision. If I am right in this Construction, a Case exists, in which according to the Provision of the Will the Limitation to Mrs. *Fawcett's* Children was to take Effect.

Supposing however I should be mistaken in this, and that the Words do in their proper Sense import a Condition, that a Child or Children should be living at Lady *Bath's* Death, the Question is, whether it would not be contrary to the Intention of the Testatrix to give to those Words a conditional Operation. That Intention must undoubtedly be collected from the Will itself; and it is quite true, that in the Absence of such Intention it is not necessary for those, who resist the Claim of Mrs. *Fawcett's* Children, to account for Lady *Bath's* requiring the Existence of a Child of her own as the Condition of her Bounty to her Friend and Relation: but on the other Hand it cannot be denied, that Words of apparent Condition may be explained and controlled by the Context of the Will.

Words of apparent Condition controlled by the Context.

In *Jones* v. *Westcomb* (a) the Words did *primâ facie* import a Condition. The Court of *Common Pleas*

(a) 1 Eq. Ca. Abr. 245. Pl. 10.

thought,

thought, the Will did not furnish sufficient Evidence of an Intention, that the Words should not so operate: Lord *Harcourt* and the Court of *King's Bench* thought, that such an Intention might be inferred from the very Nature of the Limitations: no one said, it might not be collected from other Parts of the Will.

In the Case, cited by Mr. *Raithby* from *Douglas*, of *Doe* v. *Shipphard* (*a*) the Words of themselves were Words of express Condition: "in case my Daughter "shall survive her Husband:" but the Court did not say they would look no farther for the Sense of those Words. The Reason for not supplying other Words, supposed to be omitted, was declared to be, that upon full Consideration of the whole Will they did not find sufficient to gather such Intention.

In this Case it is material to advert to the Place, where the supposed conditional Words are introduced; and the apparent Purpose, for which they are so introduced. Lady *Bath* had immediately before disposed of the Mass of her Property in favor of her younger Children. She had made whatever Provision she deemed necessary on the Supposition, that those Bequests would take Effect. Then she begins a Clause with the Words "but in case;" indicating, that she was about to provide for some Event, opposite to that, which she had hitherto been contemplating; and she accordingly proceeds to specify Cases, in which the preceding Limitation would have failed by the Want of any Children, whom she meant to consider as younger Children; if there be but one Child living at her Death, or, there being more than one living, if all but one happen to die before twenty-one in the Case of Sons, or twenty-one or Marriage in the Case of Daughters,

(*a*) *Doug.* 75.

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ters, there would come to be a Failure of younger Children, and consequently of the Limitation in their Favor; and in that Event the Property is limited over to Mrs. *Fawcett* and her Issue. It is clear, that the Testatrix was not here prescribing substantive Conditions, in the proper Sense of the Word, on which the original Devises should depend; but was specifying Events, in which the former Limitation would fail; and an Opening would be made for that, which was to be substituted in its Place.

It is true, that the Testatrix has not specified all the Modes, in which the preceding Limitation might fail; as it might not only by there being but one Child, but also by there being no Children ever born. Then it falls precisely within *Jones* v. *Westcomb*. The Limitation over depends on the Failure of that, which precedes it; but the Testatrix has not taken in all the Modes, by which it might fail. In *Jones* v. *Westcomb* the only specified Case of Failure was by the Death of the supposed Child under twenty-one: the actual Failure was by the Nonexistence of any such Child. I do not see, how these Cases can be distinguished: but, supposing they could, or supposing the Decision of the Court of *Common Pleas* had prevailed in *Jones* v. *Westcomb*, still I conceive, that this Case must be decided in favor of Mrs. *Fawcett's* Children; as this Will furnishes still farther, and, if possible, stronger, Evidence, that the Testatrix did not contemplate the Event of her having Issue as being the Condition, on which those Children were to take. I allude to the Clause, in which the Property is given over to Mrs. *Fawcett's* Brothers and Sisters: there Lady *Bath* distinctly puts the Case of her dying wholly without Issue; and yet she supposes, that in such Case nothing could prevent Mrs. *Fawcett's* Children from taking under the Will except their not living to the Age, at which their

their Interests were directed to vest; for it is only in the Event of their dying sooner that the Limitation over is to take Effect. This is in Effect a Declaration by the Testatrix, that she did not understand herself to have made the Interest of Mrs. *Fawcett* or her Family depend upon the alledged Condition. In whichever Way therefore this Case is considered, my Opinion is, that the Limitation to Mrs. *Fawcett's* Children has taken Effect.

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MURRAY
v.
JONES.
FAWCETT
v.
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1813,
July 16.
Nov. 20. 27.

ALBRETCHT *v.* SUSSMANN.

Alien, carrying on Trade in an Enemy's Country, though resident there also in the Character of Consul of a Neutral State, considered an alien Enemy; and as such disabled to sue, and liable to Confiscation.

THE Bill filed by *Charles Albretcht* and *Charles Dalbruck*, the former born in *Saxony*, the latter in *Westphalia*, and both described as resident in *France*, in the Character of Consuls of Neutral States, stated, that the Plaintiffs, carrying on Business together at *Bordeaux* as Merchants, had employed the Defendant as their Clerk; and in 1808 took him into Partnership; that the Profits of the Business had been wholly received by the Defendant, and the Accounts had never been finally settled: so that a large Sum was due to the Plaintiffs; that the Defendant had attached Goods of the Plaintiffs, sent under a Licence to their Correspondents in *London*, on Account of a Sum, alledged to be due to him for his Salary: praying an Account and Payment, and an Injunction.

Plea of alien Enemy allowed to a Bill for Relief; whether to a Bill for Discovery merely, as a Defence to an Action, *Quære.*

Mere Description in a Bill not sufficient as an Averment of a Fact: but Amendment allowed.

The

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upon a Bill praying equitable Relief. That Decision is new; and contradicts *Daubigny* v. *Davallon* (a). The Effect of this Plea may be Injustice in a particular Instance: but it stands upon Grounds of public Policy.

The VICE-CHANCELLOR.

If the Description of the Plaintiffs, as Consuls of Neutral States, constitutes a sufficient Averment, so as to put that Fact in issue, the Question is, whether Merchants, residing and carrying on Business in *France*, and, as is distinctly averred by the Plea, adhering to the King's Enemies, are, in respect of their diplomatic Character, exempted from the general Disability to sue in an *English* Court of Justice, which attaches upon an alien Enemy; and in my Opinion they are not so exempted.

The next Objection to the Plea is, that this Bill is a mere Matter of Defence; seeking no Relief beyond the Means of resisting the Action, brought by the Defendant, and establishing an equitable Set-off. The Case in the Court of *Exchequer* has gone the Length of deciding, that to a Bill merely for Discovery, as a Defence at Law, this Plea would not hold. In that Case, which I recollect, the Court had great Difficulty; and they considered the Bill merely as a Defence at Law; and the Principle seems to have been, that, if an Alien may be sued at Law, as he would be allowed Process to compel the Attendance of his Witnesses, he should have a Discovery for the same Purpose: but I did not understand the Court to lay down, that an alien Enemy could have any Relief, or any Thing but Discovery merely; and a Decision to that Effect would lead to the most extensive Consequences. The Argument from the Injustice, which may be the Effect of this Plea

(a) 2 *Anstr.* 462.

in the particular Instance, is answered by the Observation, that it stands on public Grounds. An alien Enemy not only has not the Right to sue, but has not the Right to the Property; which is forfeited to the Crown; and the Failure of private Justice, assuming that to be the Result of the Plea, is a Sacrifice due to public Policy. This Plea therefore, being a substantial Bar to the Suit, and containing all necessary Averments, must be allowed.

From this Decree the Plaintiffs appealed. *Nov. 27.*

Mr. *Leach*, and Mr. *Shadwell*, in support of the Appeal.

Sir *Samuel Romilly*, and Mr. *Sidebottom*, for the Decree.

The Lord CHANCELLOR.

Against this Plea of alien Enemy it is contended, in the first Place, that there is a specialty in the Case; the Bill representing the Plaintiffs as Consuls of Neutral States; and being invested with that Character, it is insisted, that the Plea cannot be maintained. To that the Answer is, that the Bill contains no Averment, that the Plaintiffs are Consuls; to which I am inclined to assent: but if the Difficulty turned on that, I should have permitted them to amend by stating that Fact. For the Purpose, therefore, of expressing my Opinion on this Case I shall take the Bill as averring, that the Plaintiffs are Consuls.

It is then contended, that, if they are residing there as Consuls, that Character cannot protect them, acting as Merchants; and the first Question is, whether this is a

 good

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good Plea to a Bill of Discovery. With reference to that Point there have been two Decisions in the Courts of *Exchequer*, contradicting each other, and at the Distance of twenty Years. The Ground of the last Decision was, that the Defendant at Law was entitled to a Discovery, to defend himself against the Action brought against him. It is not however necessary to determine in this Case, which of the Decisions in the Court of *Exchequer* is right; as, I apprehend, it is now settled, that if a Plaintiff is not entitled to Relief, and he files his Bill for Discovery and Relief, he is not entitled to the Discovery; but if he is entitled to Discovery only, the Bill must be framed for that Purpose (*a*); and this Bill, beyond the Discovery, requires Relief by an Account and Payment, and an Injunction.

Plaintiff, entitled to Discovery only, praying Relief, general Demurrer lies.

It is urged, that the Plaintiffs, being Consuls, cannot be treated as Neutrals; as they might have been, if they had not a commercial Establishment in an Enemy's Country, and I am of Opinion, fortified by having recourse to those best qualified to inform me, that, if a Consul, or a Person having even higher Privileges, residing in an Enemy's Country, not content with acting in that Character, embarks in mercantile Transactions, his individual Character is not merged in his national Character, which cannot protect him from the Consequences of those Transactions. It is therefore, the Habit, not only of this Country but of others, to confiscate, as Enemy's Property, the Goods of such Persons, so acting; as, if one of the King's Subjects engaged in Trade in an Enemy's Country, his Property would be confiscated; and he would not be allowed to sue here. The Question is, whether there really is in this respect any Difference between a Neutral and one of

(*a*) *Gordon* v. *Simkinson*, 11 *Ves.* 509. *Baker* v. *Mellish*, 10 *Ves.* 544, and the Note (*a*), 553.

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of the King's Subjects. I do not find, that there is any; a Neutral, so residing, being what is called, an Enemy Merchant. On the Whole this Plea meets the Case; and therefore the Decree of the *Vice-Chancellor*, allowing it, must be affirmed.

1813, LINCOLN'S INN HALL. *Nov.* 30.

FORMAN *v.* HOMFRAY.

No Relief upon a Bill by one Partner against another, not praying a Dissolution.

THE Bill, filed by one Partner against the other, prayed, that the Defendant might be held responsible for a Sum, taken by him out of the Partnership Funds, and for another Sum, a Debt released by him, and Payment of such Sums into the Cash of Copartnership, or to the Accountant-General in trust in the Cause; or, in default of such Payment, that an Account might be taken between the Plaintiff and Defendant of the Copartnership Dealings, and an Injunction, restraining the Defendant from receiving the Partnership Monies, &c. The Prayer did not extend to a Dissolution.

The Defendant having put in his Answer, a Motion was made by the Plaintiff, that the Defendant may be ordered to pay into Court, or into the Cash of the Copartnership, a Sum of £1478 : 14*s* : 6*d*. admitted in his Answer to be due from him to the Copartnership Concern in respect of his Deficiency of Capital.

Sir *Samuel Romilly*, and Mr. *Barber*, in support of the Motion.

Mr. *Leach*, for the Defendant.

The Lord CHANCELLOR said, he did not recollect an Instance of a Bill, filed by one Partner against the other, [330] praying

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praying an Account merely, and not a Dissolution; proceeding on the Foundation, that the Partnership was to continue.

Sir *Samuel Romilly* admitted, that it would be extremely difficult to produce any Authority; but said, he had a strong Impression, that he had drawn such Bills; observing, that the Continuance of the Partnership was the Ground of the Jurisdiction here; as, if the Partnership was determined, either Party might proceed at Law, to have the Account taken before Auditors (1).

The Lord CHANCELLOR observed the Inconvenience, that, if a Partner can come here for an Account merely, pending the Partnership, there seems to be nothing to prevent his coming annually (*a*).

The Motion was refused (*b*).

(*a*) In the late Cases of the Theatres the Court refused to take Jurisdiction upon any other Principle than a Dissolution of Partnership, *Waters* v. *Taylor*, *ante*, 15 *Ves.* 10. See *ante*, Vol. 1, 158.

(*b*) *Ex Relatione*, Mr. *Barber*.

1813, LINCOLN'S INN HALL. *Dec.* 9.

TURNER *v.* BAZELEY.

After Answer, not excepted to, Liberty to amend the Bill without Prejudice to the Injunction, staying Proceedings at Law, being the common Injunction, not upon the Merits, refused with Costs.

THE Plaintiff, having obtained the common Injunction to restrain the Defendant's Proceedings at Law, moved after Answer for Liberty to amend the Bill,

(1) *Ex parte Bax*, 2 *Ves.* 388, 1 *Sch.* and *Lef.* 205. 309.

"by adding the Names of three Persons, as Defendants, "and in such other Manner as he shall be advised, without Prejudice to the Injunction."

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Mr. *Richards*, Sir *Samuel Romilly*, and Mr. *Daniel*, in support of the Motion.

Mr. *Hart*, and Mr. *Wyatt*, for the Defendant, were stopped by the Court.

The Lord CHANCELOR said, he recollected no Instance of such a Motion: the Rule of the Court, admitting a Plaintiff, having obtained an Injunction on the Merits, to move to amend without Prejudice to the Injunction, does not authorize such a Motion previously to a Discussion of the Merits; this Motion also extending to an Amendment of the Bill in any Manner: the Plaintiff is in that Stage, that entitles him to sustain the Injunction by shewing Exceptions for Cause, or shewing Merits; but is not entitled to amend.

The Motion was refused, with Costs.

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LINCOLN'S
INN HALL.
Dec. 7. 10.

AYNSLEY *v.* WORDSWORTH (1).

Composition for Tithes, received after the Death of the Incumbent by the Successor, apportioned with reference to the respective Periods of Enjoyment.

THE Bill, filed by the Executrix of the late Rector of the Parish of *Bocking*, stated, that he had entered into Agreements with the several Occupiers of

(1) *Bentham* v. *Alston*, 2 *Vern.* 204.

Lands

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AYNSLEY v. WORDSWORTH.

Lands within the Parish, to receive Compositions, payable yearly at *Michaelmas*, in lieu of Tithes: that after his Death, on the 6th of *May*, 1808, the Defendant, being collated to and inducted into the Rectory, received from the Occupiers the whole of the Compositions, which became due at *Michaelmas*, 1808. The Bill, claiming a reasonable Share of such Compositions, in proportion to the length of Time, during which the late Incumbent continued Rector in the Year, in which such Compositions accrued due, prayed an Account and Payment accordingly.

The Answer insisted, that the Composition, received by the Defendant, should be divided between him and the Plaintiff in the following Mode; that the Share, to be paid to the Plaintiff should be to the Share, retained by the Defendant, as the Quantity of titheable Produce from *Michaelmas* 1807 to the Death of the late Incumbent was to the Quantity of titheable Produce from his Death to *Michaelmas* following.

Sir *Samuel Romilly*, and Mr. *Bell*, for the Plaintiff.

The Defendant, having confirmed, by receiving, the Composition, has clearly taken some Portion, to which he is not entitled; and the Question can only be, what is that Portion. This Case falls within the Equity of the Statute (*a*), apportioning Rent between the Representatives of a deceased Tenant for Life, and the Person succeeding in Remainder. That Statute has been extended by Equity to the Case of Tenant in Tail; *Paget* v. *Gee* (*b*). The Mode of apportioning the Composition, suggested by the Answer, is impracticable: the Parties to the

(*a*) Stat. 11 *Geo.* 2. c. 19. 482. 1 *Burn*'s Inst. 633. Ed.
(*b*) *Ambl.* 198. 9 Mod. Rep. 20. Tit. *Distress.*

Composition

Composition having on the Faith of it kept no Account of their Tithes; and there is not an Instance of adopting that Mode. The *Anonymous Case* (*a*) in *Bunbury* is unintelligible; referring to *Muley* v. *Webber* (*b*); where an Apportionment was decreed. *Talbot* v. *Salmons* (*c*) is no Decision upon the Point; and *Hawkins* v. *Kelly* (*d*) was compromised. Time, by analogy to the Statute, affords the only Principle for determining the Proportion.

Mr. *Hart*, and Mr. *Shadwell*, for the Defendant.

No Authority can be produced for Apportionment in the Manner suggested by this Bill; and *Williams* v. *Powell* (*e*), which followed *Hawkins* v. *Kelly*, establishes, that the Division must be made on the Principle, for which the Defendant contends. The Right of the Tenant for Life, entitled to Emblements, has no Analogy to the Rector's Right, attaching only on Severance. The Court can apportion by no other Rule than the Title. This is not in the Nature of Interest of Money, accruing *de Die in Diem*: (1) the Moment of the Predecessor's Death is to be looked at; and the Tithes then due, as severed or accrued, belong to his Representatives.

Sir *Samuel Romilly*, in Reply.

The Rule, proposed by the Plaintiff, is certain, and its Application free from Difficulty. No sound Distinction exists between Rent and Composition; both annual Payments; not accruing *de Die in Diem*; though received at particular Periods. The Rule, laid down in *Williams* v. *Powell* cannot be applied. This being a Composition

(*a*) *Bun.* 294.
(*b*) 2 Eq. Ca. Abr. 704.
(*c*) 2 Eq. Ca. Abr. 704.
(*d*) 8 *Ves.* 308.
(*e*) 10 *East*. 269.

(1) *Banner* v. *Lowe*, 13 *Ves.* 135.

for

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for all the Tithes, great and small, how on the Defendant's Principle can the Proportions be ascertained? With the Exception of *Paget* v. *Gee*, no Case was cited to the Court of *King's Bench;* which certainly was not aware of *Whitfield* v. *Pindar* (*a*), a Case at Law, deciding the same Point.

The VICE-CHANCELLOR.*

Dec. 10.

Apportionment of Rent under the Statute 11 *Geo.* 2. c. 19, and by Analogy to it, with reference to Time.

In determining the general Question, what is the Mode to be adopted for apportioning this Composition, it is proper to consider, how it stands upon Authority. With respect to Land, the Statute of George the Second (*b*) has enacted, that Time is the only Measure; and in Cases relating to Land, though not within the express Words of the Statute, the same Rule is established by *Paget* v. *Gee* (*c*), *Vernon* v. *Vernon* (*d*), *Hawkins* v. *Kelly* (*e*), and *Whitfield* v. *Pindar* (*f*): but a Distinction is taken as to Tithes; which, it is said, are not within the Act; and I agree, that a Composition for Tithes is not within it. I mention the *Anonymous Case* in *Bunbury* (*g*) merely to dispose of it; and that it may not be supposed to operate on my Judgment. A material Feature in the Case of *Paget* v. *Gee* is, that the Tenant submitted to pay the Rent. The Judgment is, that upon Payment, from a conscientious Motive, by a Person not obliged to pay in respect of a Lease expired, a Right arises to take from the Person, receiving the Payment, a Portion, to which he was not entitled. This Principle, acted upon by Lord *Hard-*

(*a*) C. P. *Hil.* 1781, cited 8 *Ves.* 311.

(*b*) Stat. 11 *Geo.* 2. c. 19. s. 15.

(*c*) *Amb.* 198. 1 *Burn's* Just. 633, Tit. *Distress*, s. 18. Ed. 20.

(*d*) 2 *Bro.* C. C. 659.

(*e*) 8 *Ves.* 308.

(*f*) In the Court of *Common Pleas*, cited 8 *Ves.* 311 by the *Lord Chancellor*.

(*g*) *Bunb.* 294.

wicke

wicke in that Case, is strongly fortified by what fell from Lord *Eldon* in *Hawkins* v. *Kelly*; which Case, though not expressly deciding the Mode of Division, I consider as laying down the Principle, that must govern Apportionment; and recognising the Analogy between Tithes and Land. The Demise of the Tithes and Glebe might perhaps have been fairly considered as within the Statute a Lease made by Tenant for Life: the Case however was not decided, or argued, on that Principle; but turned upon this, that a Person, under no Obligation, having from conscientious Motives made a Payment, that Payment was taken for the Use of the Person, under whom the Enjoyment was had; and by strict Analogy to Land the *Lord Chancellor* determined, that there should be an Apportionment.

It is said, however, that Profits of Land, arising *de Die in Diem*, differ from Tithes: but there is no substantial Distinction; since every Day yields some titheable Matter, either personal, predial, or mixed; and Tithes may perhaps more properly be said to arise *de Die in Diem*. The Composition is a Money Payment for the whole Year, substituted for Tithes in Kind; leaving the Occupier to cultivate as he pleases, free from Apprehension of being compelled to render an Account. The Law considers the Rector or Vicar as a public Functionary, entitled to some Compensation for the Duty performed; and Time is the proper Measure of that Compensation.

The Case standing thus upon Principle, and upon the Authorities, antecedent to *Williams* v. *Powell* (*a*), I am disposed to consider this Contract as if it was still in Existence. The Defendant, not taking Advantage of the Death, but upon a moral Consideration recognising the Contract, makes the Payment, as if it was still in Force. It has no

(*a*) 10 *East*, 269.

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Reference to Tithe in Kind throughout that Year, but relating merely to a Money Compensation, one uniform Payment throughout the Year, without Distinction of who was Rector at one Time, or another, what would have been the beneficial Right at different Periods, had no Contract been made, is immaterial: there being no Right to Tithe in Kind: but the Division attaching only upon a Money Payment. Under the Contract, made with the deceased Rector, the Occupier had enjoyed his Land free from Tithe: and the succeeding Rector is willing to consider the Contract as in Force; and the Parties having bound themselves so to consider it, the Payments are to be made upon that Principle, necessarily excluding Payment of Tithes in Kind.

Williams v. *Powell*, which is the Case of a Vicar, upon a fair Consideration of it does not appear to me intended to determine the general Question. All, that was decided, was, whether the Sum of £20, paid into Court, covered all the Plaintiff could be entitled to; involving no general Rule. The Report does not state, what the Vicarial Tithes were. The Representative clearly could not be entitled to a Participation of the new Compositions, subsequent to the Death; yet no Distinction is made; though the Action ought to have been confined to the Compositions made by the preceding Vicar. The Case of *Hawkins* v. *Kelly* (a) was not noticed. The Principle of Lord *Hardwicke* and Lord *Eldon* is, that the Payment was made by a Person under a moral, though no legal, Obligation, not upon a Consideration of the Value to the Tenant or Landlord at one Time or another; which does not give the fair Proportion. As applied to the general Case, it cannot be anticipated, how much had become due to the one or the other. The

(a) 8 *Ves.* 308.

Effect

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Effect therefore of considering the last Case (*a*) as laying down a general Rule, setting up the Value, and not the Time, which antecedent Authorities had taken, as affording the just, legal and equitable, Rate for ascertaining the Apportionment upon a simple Payment to the Successor, would be great Injustice; and the Consequences of adopting such a Rule upon the general Question, as applicable to all Rectors and Vicars, would be most inconvenient.

The Plaintiff therefore is entitled to an Apportionment with reference to the Period of Time, during which the last Incumbent lived; and the Defendant must account upon that Principle: but so much Doubt has been thrown upon the Subject by the Case of *Williams* v. *Powell*, that I shall not give Costs.

(*a*) *Williams* v. *Powell*, 10 *East*. 269.

SAMPSON *v.* SAMPSON.

1813, *Dec.* 17.

Surrender not supplied for a Child under a Devise in general Terms, not mentioning Copyhold Estate, and not executed to pass the Freehold.

CHARLES *Sampson*, by a Will, dated the 27th of *June*, 1795, duly attested to pass real Estates, after several specific Legacies, gave the Remainder of his Property, so far as he was able, to his Wife; whom he appointed Executrix. By a second Will, dated the 28th of *June*, 1806, expressly revoking the former Will, but attested by two Witnesses only, he gave the whole of his Property to Trustees for his Wife for Life; with Remainder to his eldest Son; he paying an Annuity of £50, or the Sum of £1000 to his other Children. The Testator died in *October*, 1806.

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The Bill, filed by *Charles Sampson*, the eldest Son, claiming under the Will, prayed, that *Lionel Sampson*, the youngest Son, and Heir according to the Custom, might be decreed to surrender the Copyhold Estates, of which his Father died seised, to the Use of his Will.

The Master's Report stated, that the Testator *Charles Sampson* at the Date of his first Will was seised of certain undivided Parts of certain Tenements, held of the Manor of *Battersea* and *Wandsworth*, and of the Manor of *Durnsford;* which he did not surrender to the Use of his Will; and that *Lionel*, as his youngest Son, was his Heir according to the Custom of the said Manors.

The Master farther found, that *Charles Sampson*, at the Date of his second Will, was seised of the several Copyhold Estates before mentioned, and also of Freehold Estates, and other Copyhold Estates, devised to him by the Will of his Father, *Thomas Sampson*, and held of the Manor of *Durnsford;* and that by a Copy of the Court Roll of the said Manor, dated the 16th of *September*, 1802, reciting, that at a Court Baron, held the 28th of *April*, 1800, it was presented, that *Charles Sampson*, by an Instrument in Writing, dated the 13th of *June*, 1802, appointed *Ralph Langton* his Attorney to receive Admission to all the Copyhold Hereditaments, of which *Thomas Sampson* died seised, and after such Admission to surrender the same to such Persons as *Charles Sampson* by his last Will in Writing, then already signed, sealed, published, and declared in the Presence of, and attested by three Witnesses, or thereafter, to be signed, &c. and to be so attested, had, given, devised, limited, or appointed, or should give, devise, limit, or appoint, the same; and that at the said Court *Charles Sampson* by the said *Ralph Langton* his Attorney produced the Probate of the Will of *Thomas Sampson*, and prayed Admission as Tenant; and thereupon the Lord by his Steward granted

granted the same to the said *Charles Sampson* by his Attorney to hold to *Charles Sampson*, his Heirs and Assigns for ever; and afterwards at the same Court *Charles Sampson* by his Attorney the said *R. Langton* surrendered the same Premises to the Use of such Persons, and for such Estates, Uses, and Purposes, as *Charles Sampson* should by his last Will and Testament, made or to be made, nominate, limit, direct, or appoint.

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The Cause was heard for farther Directions.

Mr. *Hart*, and Mr. *Wingfield*, for the Plaintiff. Sir *Arthur Piggott*, for the Defendant.

The VICE-CHANCELLOR.

Dec. 17.

The Question is, whether a Court of Equity will take this Copyhold Estate, not surrendered, from the customary Heir; to whom, the Will having no Effect for want of a Surrender, it has descended at Law; and compel a Surrender in Favour of the Devisee, the eldest Son, retaining the Freehold Estate, as Heir at Law. The Testator by the Power of Attorney to *Langton* signified his Intention, that the Copyhold should pass only by a Surrender to the Use of a Will, attested by three Witnesses; and, though generally, where there are both Freehold and Copyhold Estates, and the Copyholds are not surrendered, nor mentioned in the Will, they shall not pass, it is contended that, this latter Will being attested by two Witnesses only, a different Rule is to prevail. This is not the Case of supplying a Surrender for Creditors; and there is no Instance of doing it for a Wife or Child, where Copyhold Estate was not expressly mentioned in the Will. *Byas* v. *Byas* (*a*) and many other Cases shew, that this was always required

(*a*) 2 *Ves* 164.

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in that Case; that no Implication from Words, however large and general, would do without the Term "Copy- "hold;" though a probable Intention might appear to comprehend both Freehold and Copyhold; where, for Instance, the latter constituted the Bulk of the Estate; the Freehold being inconsiderable.

The Novelty of this Attempt for the first Time to break in upon that established Rule by supplying the Want of a Surrender in Favor of a Child in a Will, not mentioning Copyhold Estate, the Testator having both Freehold and Copyhold, is a sufficient Objection. It is said that, as this Will, being attested only by two Witnesses, can have no Operation upon the Freehold Estate, therefore, the Copyhold shall pass; *ut res magis valeat*; and by Analogy to those Cases, where the Term "Land" has been held to comprise Copyhold Estate, there being no Freehold: but here is no Analogy to that Case. The Reason this Will has no Operation as to the Freehold Estate is, not from any Defect of Intention, but the positive Rule, prescribed by the Statute; which would have had equal Effect, if the Expression had been "Freehold Land."

The Result is, that the Will being equally inoperative as to the Freehold and the Copyhold Lands, each Estate must descend to the Heir, according to Law.

1813,
Dec. 15, 16,
17. 23.

STRATFORD *v.* BOSWORTH.

Contract for Land by Letters sufficient within the Statute of Frauds; not specifically executed, unless upon a fair interpretation importing a concluded Agreement; and not doubtful, whether only Treaty.

Words construed so as to have some Meaning, rather than rejected: therefore Vendor proposing a Price, clear of all Expences, construed, that the Purchaser should bear the Expence of making out the Title: the Law imposing on him the Expence of the Conveyance.

THE Bill prayed the specific Performance of an Agreement to sell to the Plaintiff a Piece of Land consisting of something more than three Acres; as contained in the following Correspondence.

Letter from the Defendant to the Plaintiff, dated the 26th of *October*, 1808: "Having appointed to give you "a Price of the Land To-day, which you are desirous to "purchase, I do so by Note; Business at a Distance not "permitting me to call upon you. One Part of the "Land being particularly valuable to me for the Purpose "of foddering upon, and independently of this it being "no Object to me to sell it, I am not inclined to part "with the Land at a less Price than £100 *per* Acre clear "of all Expences: both Pieces next the Brook being "taken."

On the 2d of *November* the Plaintiff returned this Answer: "I think the Price you put upon your Land is, "under all its Circumstances, infinitely greater than I "could have expected. If however you think it is a fair "Price between Gentleman and Gentleman, and you "would have put the same Price upon it to any indifferent Purchaser, it will not become me to chaffer about "it; and I have therefore inclosed a Memorandum of an "Agreement between us, leaving a Blank only for the "Price; which I shall leave it to you to fill up with as "much less a Sum as you shall upon Consideration think "fit, and if not a less with the Sum *per* Acre you mention,

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tion, and I beg you will sign and return it to me To-day."

The Defendant returned the inclosed Paper unsigned; and on the 3d *November* wrote the following Letter:

" With regard to the Price of the Land in question it " is entirely a Matter of Indifference with me, whether " you accept of it, or not; consequently do not think the " Price unreasonable. Before I should think proper to " sign an Agreement for the Land, I should like to have " the Measure ascertained: lest it should cause Dispute. " If you will have the Goodness to send me your Direc- " tion in *London*, I will immediately get the Land mea- " sured, and send you the Particulars. Then I shall have " no Objection to sign an Agreement."

On the 10th of *January*, 1809, the Plaintiff, having received the Survey, wrote the following Letter:

" I have received the Survey and Admeasurement of " the Close, which you sent me by Mr. *Williams*, and I " conclude is correct. I do not suppose, that as between " you and me any more formal Agreement is necessary " than what has already taken place; that is to say, that " I am to pay after the Rate of £100 *per* Acre for the " Land; and to be put into Possession at *Lady-Day* next. " The Price is no Doubt very great; and I must beg, for " Reasons, that may be obvious to you, that you will not " mention to any Person what it is; but among others " because it may be prejudicial to me in the purchasing of " some other Bits of Land. You will be pleased to fa- " vour me with a Line, to let me know, if you do or do " not wish a more formal Agreement."

On

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On the 16th of *January*, the Plaintiff inclosed a formal Agreement; which the Defendant, understanding that it did not stipulate for the Plaintiff's paying the Money clear of all Expences, refused to sign.

The Answer stated, that by the Expression " clear of " all Expences," in the Letter of the 26th of *October*, the Defendant meant, that the Plaintiff should bear the Expence of making out the Defendant's Title, and all other Expences, to be incurred by the Sale; admitting, that he would have sold on the Terms proposed by the Letter of 26th of *October*; and sent the Admeasurement accordingly: supposing the Plaintiff acceded to his Terms; but as he had not the Answer, insisted on the Statute of Frauds; submitting, that the Letter of 26th *October* is not to be considered as amounting to an actual Agreement to sell.

Sir *Samuel Romilly*, and Mr. *Cooke*, for the Plaintiff, contended, that it is now established, that Letters may constitute an Agreement; though the Parties look to the Execution of a more formal Instrument: *Fowle* v. *Freeman* (*a*).

Mr. *Richards*, and Mr. *Newland*, for the Defendant.

Here is no Agreement, binding within the Statute of Frauds (*b*). Admitting, generally, that such an Agreement may be constituted by Letters, and is not waived by the Intention to have it put in more formal Terms, these Parties never came to any Conclusion: the Proposal, made on each Side, not being accepted. The Defendant expressly stipulates, that he will not be at any Expence:

(*a*) 9 *Ves.* 351.

(*b*) Stat. 29 *Ch.* 2. c. 3.

 the

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the only Interpretation of the Words "clear of all Expences;" as it is notorious, that the Expence of the Conveyance is always borne by the Purchaser. Admitting the Plaintiff's Construction of those Words, it is a Case of mutual Mistake. The whole Amount of these Letters however is a Treaty, which never reached its Conclusion.

Sir *Samuel Romilly*, in Reply.

To constitute an Agreement by Letters it is necessary, that the Intention of the Parties to close upon certain Terms should appear: not that it should be clear beyond all Possibility of Doubt. The Danger, against which the Statute was directed, is obviated by the Writing and Signature. The fair Result of this Correspondence is an Offer to sell at £100 *per* Acre; with an Intimation, that he is not inclined, not positively that he will not, sell for less: that Offer accepted by the Plaintiff, with an Invitation to make an Abatement. There is nothing inconsistent in what follows; requiring a Survey before signing a more formal Agreement; which was merely to guard against Dispute as to the Quantity. The few Words "clear of "all Expences," which have slipped into this Letter, cannot have the Effect of binding the Purchaser to bear the Expence of an Abstract of Title; the Extent of which he could not conjecture, and the Vendor might know to be enormous. How many Persons have no Abstracts. It is by no Means a necessary Conclusion, that a Country Gentleman is acquainted with the Rule, that the Expence of the Conveyance falls on the Purchaser: but whatever Doubt might arise from those Words is removed by the subsequent Correspondence; clearly confining them to those Expences, which a Purchaser is to pay.

The

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The Objection upon the Statute of Frauds (*a*) is answered by the Correspondence. It is unnecessary therefore to consider *Freeman* v. *Fowle* (*b*), or the other Authorities upon that; and the real Question is, whether these Letters do constitute an Agreement. If they are sufficiently explicit to indicate the substantial Terms on both Sides, the Subject of Sale and the Price, affording sufficient Materials for a more formal Contract, the mere Defect of Form will not prevent the Execution of the Contract in a Court of Equity. The general Character and Description of this Correspondence is applicable to Treaty, preliminary Proposal, leading to, rather than constituting, Agreement; which, if it exists, is not ascertained by one Paper, signed by both Parties; but must be extracted from distinct Papers, containing Proposal and Answer on each Side; to be put together; and the substantial Result collected; whether it is clear, that the Parties understood each other; and the Terms, proposed by the one, were acceded to by the other; as, unless that is ascertained, there is no Agreement. If the substantial Terms are sufficiently expressed, collateral Circumstances, not contradicting, but consistent with, them, may be supplied, as virtually comprehended in the Agreement expressed.

Upon the Effect of Letters, as constituting an Agreement, to be executed, upon which Sir *James Mansfield* has intimated (*c*), that some Cases in this Court have gone too far, the Principle is thus stated by the *Lord Chancellor* in *Huddleston* v. *Briscoe* (*d*):

(*a*) Stat. 29 *Ch.* 2. c. 3.
(*b*) 9 *Ves.* 351.
(*c*) 3 *Taunt.* 173, *Allen* v. *Bennet.*
(*d*) 11 *Ves.* 583. See 591.

The

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"The Court is not to decree Performance, unless it "can collect upon a fair Interpretation of the Letters, "that they import a concluded Agreement; if it rests "reasonably doubtful, whether what passed was only "Treaty, let the Progress towards the Confines of Agree-"ment be more or less, the Court ought rather to leave "the Parties to Law than specifically to perform what is "doubtful, as a Contract."

Examining these Letters with reference to that Principle, we cannot expect to find the Terms stated with the Formality and Precision of a legal Instrument. The Price appears clear: but the Vendor annexes a Condition, that he shall have £100 *per* Acre clear of all Expences; and one Question is, whether that means the Expence of making out the Title; which clearly would without express Stipulation fall upon him, and might be considerable; as Fines and Recoveries, and even an Act of Parliament, might be required to make out a Title to the Satisfaction of a Purchaser; from the Liability to which Expence, it is said, he meant to be exonerated. If that is not the Meaning of these Words, they have no Effect; as the Expence of the Conveyance is by the Law thrown upon the Purchaser (1). To this Claim it is objected, that he ought to have apprised the Purchaser distinctly, that he meant those Expences; which, if intended, it was easy to express; that he must have been aware of the Nature of his Title, whether complicated, or not; and whether he had an Abstract; which, when made out, would be for his own Benefit, not for that of the Purchaser of this small Piece of Land. The Case of *Ramsbottom* v. *Gosden* (*a*), which was cited, turning upon the Construction of that particular Contract, affords no general Rule of Interpretation. The Meaning of these Words therefore must be

(*a*) *Ante*, Vol. I. 165.

(1) 2 *Ves.* jun. 155.

collected

collected from the Conduct and Object of the Vendor. In selling this small Piece of Land he professes to sell at the Instance of the Purchaser; that, unless tempted by the Price, he is not inclined to part with it; being of a particular Value to him; and the Sale of it no Object: setting upon it, therefore, the least Price he would take; and adding this Condition, as the Terms, upon which alone he would sell. The ordinary Rule of Interpretation requires that Construction, which attributes some Meaning to Words, rather than totally to reject them as Surplusage. Whether aware, or ignorant, of the particular Distribution of Expence between Vendor and Vendee, contemplating, that some Expence must arise from the Sale, he means to provide, that no Part of it shall be borne by him. He might, supposing him apprised of the Rule upon this Subject, have expressed that Intention with more Precision: but meaning to say, generally, that he would bear no Expence, attending this Transfer of Property, as to the Title, or Conveyance, or on any other Account, not entering into Particulars, what Language could he use more general? He must, therefore, be understood as saying, that he will be at no Expence; receiving the Price of £100 *per* Acre clear; and all the Charges shall be borne by the Purchaser.

Then, was this Proposition of the Vendor affected by any Thing, that passed afterwards? The Plaintiff does not directly negative the Import of that Expression, "clear of all Expence," by declaring, that he will not be at the Expence of making out the Title: nor does he call for an Explanation of that general Expression. In drawing up the Agreement, which was sent, he takes up a new Term: and the only Inference upon the Subject of the Expence is to be collected from what is contained in the Parenthesis, "the same being prepared at the Ex-
"pence

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"pence of" the Plaintiff. The Defendant's Attention is not called to that Point: but the Price is distinctly brought to his Notice. He does not abandon his Stipulation, that he shall be at no Expence; and adopt the Plaintiff's new Proposition, to bear the Expence of the Conveyance alone. Agreeing, therefore, upon the Subject of Sale and the Price they differ upon that substantial Point; and while they so differ, the Transaction cannot be represented higher than Treaty. The Defendant's subsequent Letter, of the 3d *November*, plainly imports a suspended Decision; expressly declining to sign an Agreement, until the Land shall have been measured. I should do the greatest Violence to his Language by holding, that what had previously passed bound him, as a concluded Agreement.

The Result is, that this Correspondence, taken altogether, has not reached beyond Treaty; and these Papers cannot be blended into one concluded Agreement. The Consequence is, that the Bill must be dismissed. With regard to Costs, this is a Case of Misunderstanding, arising from the Want of clear, unequivocal, Conduct and Language. The Defendant also insisted on the Statute of Frauds; for which there is no Pretence: but on the former Ground it is not a Case for Costs.

1813,
Nov. 4,
Dec. 24.

KIMPTON v. EVE.

Breach of Injunction after Notice of the Order without personal Service of the Injunction or Order.

Injunction against Waste by Tenant.

Waste by Destruction of a Dove-cote: not by removing Presses, &c., unless fixed.

Distinction between express Covenant and implied Agreement, as to be inforced by Injunction: granted in the former Instance, not in the latter, against Tenant, removing Articles contrary to the Custom of the Country.

Special Covenants, as to Cultivation, not implied from the mere Act of holding over; as they may be from Payment of Rent at the same Period; as Evidence of Agreement to hold, not only on the same Terms, but subject to the same Covenants.

THE Bill stated a Lease, dated the 20th *December*, 1792, to hold from the 10th of *October* preceding for twenty-one Years, with Covenants by the Tenant to repair, and for the Cultivation of the Farm; that the Defendant, the Tenant, had committed Waste by destroying the Dove-cote, by removing the Locks from the Doors of the House, the Chains from the Lawn, the Statues, Images, and Fences, from the Pleasure Grounds, Wardrobes, Presses, and Closets, forming Part of Wainscot of the House, and by carrying away Dung and Manure, and selling Wheat and other Straw; that he threatens to carry away large Quantities of Wheat Straw; and has advertised to sell Straw and Part of the standing Crop of Oats and Wheat, &c.; praying an Injunction and Account.

The Defendant having proceeded to a Sale after personal Service upon him, on the 9th of *August*, of a Notice in Writing, that an Order for an Injunction was granted, a Motion was made, that the Defendant, his Solicitor, and the Auctioneer, should stand committed.

The Defendant by his Affidavit admitted his Belief, that the Order had been made; alledging, that he acted by the

Advice

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Advice of his Solicitor; who conceived, that a mere Notice, without Service of the Injunction, or Order, had no Effect.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Agar*, in support of the Motion.

Mr. *Leach*, for the Defendant, contended, that to constitute a Contempt personal Service of the Injunction, or the Order, was necessary in every Case, except where the Party was present in Court, when the Order was pronounced: an Exception made in the Time of Lord *Hardwicke* (a).

The Lord CHANCELLOR.

Nov. 4. I refrained from making the Order for the Costs upon this Application under the Confidence that it would not be necessary: but the Point was fully discussed; and my Opinion expressed, that according to the Practice this is a Breach of the Injunction; and the Costs ought to be paid; and that still continues my Opinion.

Exception to the Rule, requiring personal Service of an Order of Injunction, where the Party was present, when the Order was made, established by Lord *Hardwicke*: farther extended since to Notice by Information.

It is true, that before Lord *Hardwicke*'s Time, who first made the Exception of the Case of a Party actually present in Court, hearing the Order made, actual Service of the Injunction was required. Lord *Hardwicke*, I suppose, felt the enormous Mischief of permitting a Man, hearing an Order pronounced, restraining him from doing an Act, to walk out of Court, and immediately do that Act, before Service of the Injunction (1): but, if that Extension of the

(a) *Hearn* (printed *Osborne*) v. *Tennant*, 14 *Ves.* 136, and the References.

(1) *Skip* v. *Harwood*, 3 *Atk.* 564. *Anon.* 3 *Atk.* 567. This Practice, though discountenanced by Lord *Thurlow* in *Pengree* v. *Jonas*, 2 *Bro. C. C.* 141, has been since extended to the Case of a Party in Court during the Proceeding, but retiring before the Order pronounced: *Osborne* v. *Tennant*, 14 *Ves.* 136. *James* v. *Downes*, 18 *Ves.* 522.

Practice

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KIMPTON v. [illegible].

Practice was right, the Court could not stop short; refusing to apply the Principle in other Cases, affording the same Necessity for its Application. I have heard some of my Predecessors in this Place treat as a great Abuse of Justice and want of Consistency the Refusal to apply that Practice, which is applied to a Person, present in Court, and hearing the Order, to a Man, standing outside of the Court, and informed by some one, who heard it, that the Order was pronounced.

I was very much struck with the Necessity of considering this Subject by what happens constantly in the Long Vacation. Consider, what may be the Consequence of the Practice, contended for by the Defendant. This Court, though always open in a Sense, is not always equally accessible. Great Occasion for an Injunction may arise in the Long Vacation in Cases of the highest Importance. The Order perhaps cannot be made in Town by the Person, holding the Great Seal: but suppose it made in Town: it is frequently impossible, that it can be put in a State to be served by the Application of the Great Seal for two or three Days; and in the Instance of an Injunction against committing Waste the Party might in the Interval lay the Axe to the Tree: if it was against marrying a Ward of the Court, the Marriage might be had next Morning by a Licence, fraudulently obtained; and there is no one Case, in which the Process of Injunction is most useful, in which it may not be defeated, if the Practice, now contended for, is in every Instance strictly adhered to.

In this Case, the Party admitting, that he believed the Order was made, the Principle is the same as if his Belief was formed from Information, short of actual Service; and finding myself in the constant Habit in the Long Vacation of directing Notice to be given, that the Order

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Order was made, I thought there was Authority enough for applying this Practice, if he would not say he did not believe the Order was pronounced.

It is necessary to repeat the Answer I made to the Objection, that a Solicitor might say, the Order had been granted; and that might operate to the serious Injury of the Party, deceived by that Representation. The Answer I gave to that Objection is, that many Acts are authorised by the Law, that may be very injurious; and the only Protection against such Injury consists in the heavy Punishment, that awaits such an Act: as the Solicitor, so intimating without Foundation, that an Injunction had been granted, would unquestionably be liable to be struck off the Roll, to make Satisfaction to the Party injured, and to an Indictment for so acting. There is therefore great Security to personal Liberty in general Cases; and, if he would go the Length of saying, he did not believe the Order was made, I would not act upon this Practice: if he will not say that, my Opinion is, that the Costs must be paid.

Solicitor, falsely representing, that an Injunction was granted, liable to Damages, an Indictment, and to be struck off the Roll.

On the 29th of *November* the Injunction was by an Order, pronounced by the *Vice-Chancellor*, dissolved upon the Answer; insisting, that the Lease, which was made under a Power, was void.

A Motion was made to revive the Injunction.

The Lord CHANCELLOR.

Dec. 24.

The Foundation of this Motion to revive the Injunction is, 1st, A clear Act of Waste: 2dly, Another Act, removing Things, supposed to be fixed to the Freehold, Wainscot, Presses, &c.: 3dly, Another Act, not properly Waste, but one, upon which the Court has been in the Habit

Habit of acting as Waste; injoining what may be represented as a Breach of Covenant, or more accurately, an implied Agreement, flowing from the Relation previously existing between the Parties, as Covenantor and Covenantee.

By the Affidavits this Tenant is represented as holding over under the same Covenants or Agreements. I will consider the last Object of the Injunction first. Though the Court has in many Instances of express Covenant granted an Injunction against removing certain Articles contrary to the Custom of the Country, in the Case of an implied Agreement, to be carried into Effect by another Remedy than an Action of Covenant, there would be considerable Hazard of impeding a Man in the Exercise of his Right upon that Ground. This therefore cannot rest upon the Custom of the Country. I admit, with regard to implied Covenants, that in the Case of a Lease, determined by Effluxion of Time, the Payment of Rent at the same Period is Evidence of holding, not only on the same Terms, but, farther, subject to the same Covenants and Agreements: even if there was a Course of Husbandry provided by the Lease, running through one or two Years. It is however but Evidence. Though there could be no Action of Covenant, an Action on the Case would lie; declaring specially on the implied Agreement; with an Averment, that the Plaintiff was always ready to perform his Part; and the Landlord, if he had attempted to disturb the Tenant, never could make good his own Declaration, such as it must be, to support an Action.

Action on the Case upon implied Agreement; with Averment, that Plaintiff was always ready to perform.

Looking at this Lease, what was to be done in a Course of Years, and in the last Year, and attending to the Circumstance, that was pressed, that this is the last Year, I cannot apply to the twenty-first Year a Principle, which I could not apply to the twentieth. As to the Dove-cote a

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clear Act of Waste is proved: therefore against Waste the Injunction must be revived: but I cannot grant it against removing the Presses, *eo nomine*, if not fixed to the Freehold; in which Case it would be Waste. As to the rest of the Case, I cannot grant the Injunction; as I cannot infer, that the same Agreements apply to the Tenant in his present Relation to his Landlord.

1814, *Jan.* 12.

WALL v. STUBBS.

Plea of Matter of Record, with Averments of Matters *in Pais*, must be filed upon Oath. Therefore Plea of the Stat. 32 *Hen.* 8. c. 9, against selling pretended Titles, with the necessary Averments, of want of Possession, &c. not being on Oath, ordered to be taken off the File; though set down by the Plaintiff for Argument: this Irregularity not admitting Waiver.

THE Bill prayed the specific Performance of a Contract by the Defendant to purchase an Estate from the Plaintiff. The Defendant pleaded the Statute (*a*), intitled, "The Bill of Bracery and buying of Titles."

The Plea, setting out the second Section of the Statute, averred, "That Plaintiff had not, and that Antecessors of "Plaintiff had not, and they by whom he or they claimed "the said Lands, Tenements or Hereditaments, or any "of them, had not, been in Possession of the said "Lands, &c. or any Part thereof, by the Space of one "whole Year next before the Covenant Promise or "Agreement, charged or inquired after by the said Bill: "neither was the said Plaintiff at the Time the said Agreement by the said Bill was alledged to have been entered "into in lawful Possession of the said Lands, &c. by "taking the yearly Farm Rents or Profits of or for the "said Lands, &c. or any Part thereof; and this Defendant "doth plead the said Statute, and that the making the "Discovery prayed by the said Bill may tend to subject "this

(*a*) Stat. 32 *Hen.* 8. c. 9.

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"this Defendant to the Forfeiture of the Value of the "said Lands, &c. by the said Bill charged to have been "convenanted promised and agreed to be bought and "taken by this Defendant."

The Plaintiff, having set this Plea down for Argument, moved, that it should be taken off the File; not being put in upon Oath.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Pepys*, in support of the Motion, contended, that a Plea of this Kind, as a Plea of the Statute of Limitations, must be filed on Oath; tendering an Issue in Fact; and not falling within the Exceptions, stated (*a*) by Lord *Redesdale*; which are Pleas to the Jurisdiction, of Matter of Record, and to the Disability of the Plaintiff.

Mr. *Leach*, and Mr. *Daniel*, for the Defendant.

There is no Instance of a Plea without an Averment of some Kind. A Plea even of Matter of Record requires some Averment, connecting it with the Suit, and the Person of the Defendant. The Reason, that a Plea of the Statute of Frauds, or the Statute of Limitations, must be upon Oath, is, that Acts of Part Performance in the one Case, and a Promise in the other, must be denied: but without such Allegations those Pleas would not require an Oath.

If, however, this Objection might have been made in the first Instance, it is answered by the Plaintiff, setting down the Plea to be argued; and thereby admitting its Regu-

(*a*) Tr. Ch. Pl. 239.

 larity;

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larity; this Rule being made for the Plaintiff's Benefit; to guard against Vexation and Delay; as the Objection of Impertinence in a Bill, and the Right to Security for Costs from a Plaintiff abroad, are waived by an Answer, or an Order for Time (*a*). There is this Distinction between a Plea and an Answer. The latter could not be filed without Oath, unless by a gross Breach of Duty in the Officer: but, with regard to a Plea, a Question of Difficulty may arise; and, the Rule being for the Protection of the Party, he is bound to watch over his own Interest.

Sir *Samuel Romilly*, in Reply.

This Plea has several Averments; that such an Act of Parliament passed; that the Plaintiff sold a disputed Title; that there was no Possession: Allegations necessary to bring the Case within the Act; upon which Allegations Issue would be joined. A Defendant is not called upon to speak positively except as to his own Acts (*b*): As to the Acts of others, and what he states from the Information of others, he speaks to his Belief only. A Plea of the Statute of Limitations is always upon Oath: averring, that the Defendant did not, or in the Case of an Executor, that he believes the Testator did not, promise within six Years. So a Plea of the Statute of Frauds, of which there have been many Instances without an Answer, is always upon Oath. In a Plea of Matter of Record nothing is necessary but the Production of the Record; which proves the Plea.

The Objection as to the Waiver would prevail, if the Rule, that Pleas and Answers shall be filed upon Oath

(*a*) Anon. 5 *Ves.* 656. (*b*) Lord *Clarendon*'s Orders.

had

had been established for the Benefit of the Party merely: but it is for the Sake of the Court; who, not permitting the Party to suggest an imaginary Case, require his Oath. An Answer therefore, filed without Oath, unless that is warranted by an Order, may, as a Bill, or an Answer in Town, without the Signature of Counsel, be taken off the File at any Time. In this respect there is a perfect Analogy between a Plea and an Answer. The Plaintiff was under the Necessity of setting down the Plea within eight Days: otherwise he would have admitted its Validity; and he was not to presume Negligence in the Officer by filing it irregularly: he might suppose a Mistake in the Copy.

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The VICE-CHANCELLOR.

As to the first Question, there is no Doubt, upon Reason and Authority, that this Plea of a Statute, which *per se*, without the Averment of Facts, to which it applies, is nothing, ought to be put in upon Oath. As far as it is a Plea of the Statute, it is a Plea of Matter of Record: but all the Facts, forming a complete equitable Bar, must be averred. The main Part of this Plea consists of Facts; which, being Matters *in Pais*, must be substantiated by Oath. It is true, according to the *Cursus Cancellarius*, if the Subject of the Plea is mere Matter of Record, that speaks for itself; and, though there may be a Necessity of identifying the Party, the main Thing is the Production of the Record: but here the Statute has no Application, until the material Point of the Fact of Possession by the Party, making the Agreement, is established. Upon that Fact, coupled with the Statute, the Plea rests; and the Substance of the Defence is the Assertion of a Fact, which, if, true, disposes of this Bill by the Effect of the

Plea of mere Matter of Record not filed on Oath; being proved by the Production of the Record.

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Law. The Passage in Lord *Redesdale's* Treatise (*a*) is express upon this Point, that a Plea of this Kind is to be considered Matter *in Pais*: the Substance consisting of Averments, necessary to bring the Case within the Statute; which must be upon Oath.

The second Point, that the Plaintiff, having taken a Step, recognizing the Plea as regular, by setting it down to be argued, has waived this Objection, is put thus; that this Rule, requiring the Plea to be put in upon Oath, is entirely for the Benefit of the Plaintiff; who, if that is so, may certainly waive it; and this is compared to the Case of a Plaintiff abroad, required to give Security for Costs: but a Plea of this Nature stands precisely upon the Footing of an Answer. In both Instances the Oath of the Defendant is for the Benefit of the Plaintiff certainly; but is also prescribed by the established Course of the Court; if not dispensed with by an Order. This therefore is, not one of those Irregularities, that can be waived by taking a Step in the Cause, but an erroneous Proceeding, contrary to the established Course of the Court, making the Record imperfect; as in the Instance of a Bill or Answer without the Signature of Counsel.

Bill or Answer (taken in Town) not to be filed without the Signature of Counsel.

This Plea must therefore be taken off the File.

(*a*) Tr. Ch. Pl. 239.

BLACKBURN

LINCOLN'S INN HALL. 1814, *Jan.* 10, 11.

BLACKBURN *v.* JEPSON.

Appeal to the *Lord Chancellor* from a Part of the Decree, affirmed on a Re-hearing at the *Rolls*: but the other Party having previously appealed from another Part of the Decree, the second Appeal brought up to the first.

IN this Cause (*a*) the Defendants, on the 6th of *November*, 1811, presented a Petition for a Re-hearing at the *Rolls* as to Part of the Decree, pronounced at the *Rolls* on the 3d of *August*, 1810, directing an Account of Tithes in Kind. On the 3d of *March*, 1812, the Plaintiffs presented a Petition of Appeal to the *Lord Chancellor* against so much of the Decree as directed Issues to try the Moduses. On the 11th of *March*, 1812, the Cause was re-heard at the *Rolls* on the Petition of the Defendants; and the Decree was affirmed.

On the 13th *November*, 1813, the Order, affirming the Decree, not being passed, the Defendants presented a Petition of Appeal to the *Lord Chancellor* against that Part of the Decree, which directed an Account of the Tithes in Kind; on which Petition an Order was made by the *Lord Chancellor* for setting down the Appeal.

A Motion was made by the Plaintiffs to discharge that Order of the *Lord Chancellor*.

Mr. *Agar*, and Mr. *Bell*, in support of the Motion.

An Appeal to the *Lord Chancellor* can be considered only as a Re-hearing: the Decree, though pronounced at the *Rolls*, being the Decree of the *Lord Chancellor*; and the Rule, that there can be but one Re-hearing, is now settled in *Brown* v. *Higgs* (*b*), upon a full Consideration

(*a*) Reported 17 *Ves.* 473.

(*b*) 8 *Ves.* 561. See 16 *Ves.* 214. *Waldo* v. *Caley*, and *M'Intosh* v. *Townshend*, 16 *Ves.* 330. The Case of *Fox* v. *Mackreth*, alluded to in *Brown* v. *Higgs*, is now published, 2 *Cox.* Rep. 158.

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of all the Cases. That Rule is most salutary: this Practice being calculated only for Delay; admitting four Hearings of every Cause, before it goes to the House of Lords: a Re-hearing by the *Master of the Rolls* of his own Judgment, and a Re-hearing by the *Lord Chancellor* of his own Decree, after that Re-hearing at the *Rolls*.

Mr. *Richards*, Sir *Samuel Romilly*, and Mr. *Winthrop*, for the Defendants.

In *Brown* v. *Higgs* the Appeal was heard; and the Cases there collected have not established, that the *Lord Chancellor* shall not hear a Cause, which has been twice heard at the *Rolls*. The greatest Absurdity would result from such a Rule; making the *Lord Chancellor* a mere ministerial Officer, to enrol the Decrees of a Judge of inferior Jurisdiction; and obliging the Suitor at once to incur the Expence of an Appeal to the House of Lords, without the Option of having the intermediate Opinion of the *Lord Chancellor*; who would thus incur the Responsibility of Judgments in Cases, which he had never heard argued.

Jan. 11.

The Lord CHANCELLOR said, having read the Case of *Brown* v. *Higgs*, he could not refuse to hear this Appeal: but under the Circumstances it ought to be brought up to the other Appeal.

EVANS

1814, *Jan.* 26.

EVANS *v.* HARRIS.

Plea to the principal Ground of Relief, as the Statute of Frauds, with Averment of no Agreement in Writing, not going to collateral Circumstances, charged as Evidence of it, over-ruled.

THE Bill stated a parol Agreement by the Defendant to grant to the Plaintiff a Lease for twenty-one Years of a Farm; that *Cheese* and *Davis*, the Attorneys of the Defendant, were to prepare a proper Agreement for a Lease; and for that Purpose the Parties met at their Office; and *Cheese* drew up an Agreement in Writing, dated the 14th *December*, 1802, to demise to the Plaintiff the Farm (except two Coppices) for twenty-one Years, &c.; that one Part only of such Agreement was signed by the Plaintiff and the Defendant, in the Presence of *Cheese* and another Person; which was agreed to be left with *Cheese* and *Davis*, as the Attorneys of both Parties, and in order that they might prepare a Lease: that "in "pursuance and part Performance of the said Agree-"ment," the Defendant, on the 2d of *February*, 1803, delivered Possession to the Plaintiff: but that no Lease had been executed; and the Defendant had brought an Ejectment.

The Bill charged, that an Agreement in Writing had been entered into; "and as Evidence thereof," that *Cheese* on the Execution of it observed, that neither Party could flinch; that the Defendant had frequently admitted, that he had agreed to grant the Plaintiff a Lease; stating specific Instances of such Admissions: that the Defendant had got the Agreement out of *Cheese*'s Hands; to whom he never returned it, or, if he did, upon *Cheese*'s Death, in *January*, 1812, it again came into the Defendant's Hands, as Executor of *Cheese*; and that the Defendant either now has the same in his Custody, or has destroyed it.

The

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The Bill prayed a specific Performance "of the Agree- "ment so made and entered into by and between the De- "fendant and Plaintiff as aforesaid," for a Lease of the Farm (except the two Coppices), and an Injunction.

The Defendant put in a Plea, to all the Discovery and Relief, of the Statute of Frauds; averring, that neither the Defendant, nor any Person by him lawfully authorised, did ever make and sign any Contract or Agreement in Writing for making or executing any Lease to the Plaintiff of the Premises in the Bill mentioned, or to any such Effect as by the said Bill suggested, or any Memorandum or Note in Writing of any Agreement whatsoever for or concerning the demising or leasing or making or executing any Lease of the said Premises.

Sir *Samuel Romilly*, and Mr. *Blake*, in support of the Plea.

This Bill states two Agreements, one parol, the other written; varying in this Respect, that the latter excepts two Coppices. The Bill proceeds wholly on the written Agreement; to which even the Allegation of part Performance refers; though ineffectual for that Purpose; and, the Plea directly denying the written Agreement, upon which the whole Equity of the Case rests, all the collateral Allegations must fall with it.

Mr. *Hart*, and Mr. *Phillimore*, for the Plaintiff.

The Plaintiff alledges a parol Agreement, and part Performance, only as Part of the *res gestæ*, and as Inducement to the Charge, that a written Agreement was prepared, and left with the Attorney; from whom it was procured, and destroyed. These Allegations are not answered

swered by the Plea, that no Agreement was signed: the contrary is asserted upon the Defendant's Declarations: the Question therefore is, whether this Plea can exclude all farther Discovery. The Defendant cannot by a Plea, denying the principal Fact, evade a Discovery of the collateral Facts, connected with it; which must be met either by Plea or Answer; *Bayley* v. *Adams* (a): *Jones* v. *Davis* (b). In the latter Case the Charge as to keeping the Accounts was immaterial, except as Evidence of the Agreement, set up by the Bill. In this Case the collateral Circumstances, disproving the Allegation of the Plea, that no written Contract existed, are not denied either by Plea or ver.

Sir *Samuel Romilly*, in Reply.

In the Case of a Bill for the specific Performance of a parol Agreement, alledging Acts of part Performance, the Defendant must deny those Acts of part Performance, which have been held equivalent to Writing: but the part Performance is not alledged by this Bill as taking the Case out of the Statute: the Bill proceeding on the written Agreement. The Plaintiff is entitled to a Discovery, whether such a written Agreement ever existed: but he is entitled to no more.

The VICE-CHANCELLOR.

The Expression in this Bill, "in pursuance and part "Performance of the said Agreement," must be understood as referring to the written Agreement; which is the last Antecedent; and, the Bill stating Circumstances, from which the Existence of such written Agreement is inferred, especially the Acknowledgment of the Defendant, that he

(a) 6 *Ves.* 586. (b) 16 *Ves.* 262.

had

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had agreed to grant a Lease to the Plaintiff, I must understand this to be a Bill praying a specific Performance of that written Agreement, and not of a parol Agreement, in part performed: in which Case the part Performance ought to be denied; as raising a substantive Ground of Relief, which a Plea of the Statute of Frauds does not meet. The Statute has no Application, if the written Agreement charged does exist. The Question then comes to this; whether, when the Relief rests on one material Fact, as Evidence of which several collateral Facts are charged, it is sufficient to deny the substantive Fact; or whether a Defendant must not discover the collateral Facts (1). To a Bill, stating Corruption of Arbitrators, is it sufficient to plead the Award merely; leaving the Charge of Corruption untouched? Can a Defendant protect himself by a negative Plea from the Discovery of a Variety of Circumstances charged, which, if discovered, would establish the Fact in Issue? Suppose a Bill, alledging a Partnership; and insisting, that the Existence of such Partnership was made out by a certain Document, by Settlements of Account and Admissions: Would it be sufficient to plead to such a Bill a mere Denial, that the Partnership ever existed (*a*); stopping there? I cannot find asserted by any Authority, that a Plea of one solitary Fact would enable the Defendant to avoid all farther Discovery. Such a Plea would be no better than an Answer; but the Defendant, if he had taken that Course, must have gone farther (*b*). Why then should a Plea have this Effect? I cannot conceive a Principle, on which this Plea can be good: nor can I distinguish this Case from *Jones* v. *Davis*; which is a clear Decision by the *Lord Chancel-*

To a Bill, charging Corruption of Arbitrators, Plea of the Award merely not sufficient.

Negative Plea, as no Partnership, not going to collateral Circumstances, charged as Evidence of it, insufficient.

Answer must be full.

(*a*) *Drew* v. *Drew*, *ante*, 159, and *Chamberlain* v. *Agar*, *ante*, 259.

(*b*) *Rowe* v. *Teed*, 15 *Ves.* 372. *Leonard* v. *Leonard*, 1 *Ball & Beat.* 323.

(1) *Dixon* v. *Olmius*, 1 *Cox.* 414.

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lor, that a mere Denial of an Agreement, without denying the Circumstances, charged as making it out, will not do.

This Plea must therefore be over-ruled.

1814,
Feb. 1.

YOUNG *v.* SUTTON.

Commissioners under a Commission of Partition have no Lien on the Commission for their Charges.

A COMMISSION of Partition between the Plaintiffs and Defendants, seised as Tenants in Fee, having issued, the Commissioners refused to return the Commission, until they should have been paid the Sum of £1960; which they charged on Account of their Expences. The Parties, having paid them £1120, obtained an Order on the 30th of *November*, 1813, upon them to return their Certificate of the Execution of the Commission within three Weeks, or shew Cause. That Order not being obeyed, a Motion was made, that they do forthwith return their Certificate of the Execution of the Commission.

Mr. *Hart*, and Mr. *Cooke*; Mr. *Wray*, and Mr. *Whitmarsh*, for the several Plaintiffs and Defendants, in support of the Motion, contended, that the Commissioners, as Officers of the Court, were bound to return the Commission; leaving it to the Court to fix what they are entitled to; and had no Right to retain it, until they had received whatever Sum they chose to charge; that under Commissions to examine Witnesses the Commissioners were never allowed to fix their own Charges, and retain the Commis-

sion

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sion until they are paid; which would lead to great Inconvenience and Extortion.

Mr. *Richards*, for the Commissioners, resisted the Application. A considerable Part of the Sum charged consisted of the necessary Expences of Surveyors, Workmen, &c. employed in the Partition: if the Commission should be taken out of their Hands, they would have merely a personal Remedy against the Parties; and the Commissioners, as Officers of the Court, are entitled to its Protection.

The VICE-CHANCELLOR.

These Commissioners, having undertaken a Duty, in the Prosecution of which they have incurred considerable Expence, and some Liabilities, cannot insist in the first Instance on Payment, before they make their Return. It is not competent to an Officer of the Court to stop in any Stage of his Duty, and refuse to proceed. He must go on to complete it; and may then come to the Court for his Remuneration. A contrary Rule would be highly conducive to Injustice; and favor exorbitant Demands. I think, therefore, the Cause shewn is not sufficient; and the Commissioners must return the Commission with their Certificate.

ROLLS.
1813,
July 15.
1814,
Feb. 17. 19.

BLACKBURN *v.* STABLES.

Devise in Trust for a Son of the Testator's Nephew *A.* at the Age of twenty-four: if he hath no Son, to a Son of the Testator's Great Nephew *B.*: but, if neither have a Son, then to a Son of the Testator's Great Niece's Daughter, taking his Name: whoever should take not to be put in Possession of any of the Testator's Effects until twenty-four: nor the Executors to give up their Trust "till a proper "Intail be made to the Male Heir by him."

An Executory Trust in Tail for an only Son of *A. en ventre* at the Testator's Death; not void for Uncertainty, nor too remote.

JOSEPH Blackburn by his Will, dated the 25th of *May*, 1787, devised as follows: "All the Rest or "Remainder of my real and personal Estate I give and "bequeath in Trust to my Executors *Joseph Blackburn*, "my Nephew and Executor, and *Miles Flesher*, who married my Great Niece: that is, for the sole Use and Benefit of a Son of the said *Joseph Blackburn* an Executor at the Age of twenty-four Years: if he hath no "Son, to a Son of my Great Nephew *Joseph Blackburn*, "Son of my Nephew *Benjamin Blackburn*: but if neither of these have a Son, then to a Son of my Great "Niece's Daughter *Elizabeth Flesher*," with a Direction to take the Name of *Blackburn*: "but on whomsoever "such my Disposition shall take place my Will is, that "he shall not be put into Possession of any of my Effects, "till he attains the Age of twenty-four Years: nor shall "my Executors give up their Trust, till a proper Intail "be made to the Male Heir by him."

Joseph Blackburn, the Executor, had not any Son born at the Death of the Testator: but his Wife was then *ensient* with the Plaintiff; who was soon afterwards born, and had attained the Age of twenty-four.

The Bill prayed an Account of the personal Estate, and of the Rents and Profits of the real Estate, &c.

Sir

1814.

BLACKBURN v. STABLES.

Sir *Samuel Romilly*, and Mr. *Johnson*, for the Plaintiff.

Though *Joseph Blackburn*, the Executor, had at the Death of the Testator no Son born, the Son, then in *ventre sa mere*, and afterwards born, may be considered as having been in the Testator's Contemplation: such Child being considered as in Existence for his Benefit: *Swinburne*, 487, *Beale* v. *Beale* (*a*), *Northey* v. *Strange* (*b*), and many other Cases.

2dly. This is either an Estate Tail in the Plaintiff, or in his first Son; if *Archer's* Case (*c*) is applicable; the Intention to intail this Estate being declared. In all the Cases of Executory Trust there was some Indication of an Intention, that Care should be taken to prevent the first Taker from cutting off the Intail. That is expressly stated in the great Case of *Leonard* v. *The Earl of Sussex* (*d*); upon which all the others proceed; and there is no Instance of abridging the first Estate without some Foundation for the Inference of a strict Intail, which the first Taker should not have the Power of determining: in other Words, an Intention to make the Estate unalienable, as long as the Rules of Law would permit. Here is no Foundation for that Inference; as there was in *Papillon* v. *Voice* (*e*) from the express Words, "Estate for Life "without Impeachment of Waste." The only distinct Object of this Testator, the Perpetuation of his Name, would not in some Events be answered by an Estate for Life only.

Mr. *Barber*, for the Defendants, objected to the Devise, as being void: first, For Uncertainty: *Doe* on the Demise of *Hayter* v. *Joinville* (*f*).

(*a*) 1 *P. Will.* 244.
(*b*) 1 *P. Will.* 340.
(*c*) 1 *Co.* 66.
(*d*) 2 *Vern.* 526.
(*e*) 2 *P. Will.* 471.
(*f*) 3 *East.* 172.

2dly. As

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2dly. As too remote: *Lade* v. *Holford* (a), *Phipps* v. *Kelynge* (b), *Stephens* v. *Stephens* (c), *Taylor* v. *Biddul* (d), *Long* v. *Blackall* (e).

Sir *Samuel Romilly*, in Reply, answered the Objection of Uncertainty by observing, that, as there was but one Child, the Event rendered the Object certain.

1813. *July* 15.

The MASTER *of the* ROLLS, on making the Decree in the first Instance in the Plaintiff's favor, observed, that it is perfectly settled, that a Child in *ventre sa mere* is to be considered as in Existence for his Benefit; and *Thellusson's* Case (f) went farther; where it was held, that such a Child should be so considered to his Disadvantage; those, who supported the Will, relying upon the Distinction, that for his Advantage he was to be so considered.

1814, *Feb.* 19.

The MASTER *of the* ROLLS.

No Distinction between Executory Trusts by Marriage Articles and Will, except the Inference from the Object of the former, to provide for the Issue, that the Father should not have the Power to defeat it. Therefore Estate for Life with Remainder to the Heirs of the Body a strict Settlement in the one Case; an Estate Tail in the other, unless clearly not meant in their technical Sense.

It seems clear, that this is an Executory Trust; and I know of no Difference between an Executory Trust in Marriage Articles and in a Will (g), except that the Object and Purpose of the former furnish an Indication of

(a) 3 *Bur.* 1416.

(b) In *Chancery*, before Lord *Camden*, 20th *July*, 1767, *Fearn.* Ex. Dev. Ed. 4, by *Powell*, 84, stated from the Register's Book, *ante*, 57.

(c) *For.* 228.

(d) 2 Mod. 289. 1 Eq. Ca. Abr. 188. *Freem.* 243.

(e) 3 *Ves.* 486. 7 Term Rep. 100.

(f) 4 *Ves.* 227.

(g) 12 *Ves.* 227, *The Countess of Lincoln* v. *The Duke of Newcastle.*

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Intention, which must be wanting in the latter. When the Object is to make a Provision by the Settlement of an Estate for the Issue of a Marriage, it is not to be presumed, that the Parties meant to put it in the Power of the Father to defeat that Purpose, and to appropriate the Estate to himself. If therefore the Agreement is to limit an Estate for Life, with Remainder to the Heirs of the Body, the Court decrees a strict Settlement in conformity to the presumable Intention: but, if a Will directs a Limitation for Life, with Remainder to the Heirs of the Body, the Court has no such Ground for decreeing a strict Settlement. A Testator gives arbitrarily what Estate he thinks fit. There is no Presumption, that he means one Quantity of Interest rather than another, an Estate for Life rather than in Tail or in Fee. The Subject being mere Bounty, the intended Extent of that Bounty can be known only from the Words, in which it is given: but, if it is clearly to be ascertained from any Thing in the Will, that the Testator did not mean to use the Expressions, which he has employed, in their strict, proper, technical, Sense, the Court in decreeing such Settlement as he has directed will depart from his Words in order to execute his Intention: but the Court must necessarily follow his Words, unless he has himself shewn, that he did not mean to use them in their proper Sense; and have never said, that merely because the Direction was for an Intail, they would execute that by decreeing a strict Settlement.

Let us see then, what Estate the Plaintiff would have according to the literal Import of the Direction in this Will.

Certainly the "Male Heir by him" cannot be the first Taker: there must be some Estate limited to the Ancestor; and the Male Heir can only take by Way of Remainder.

der. Suppose the Limitation made to the Plaintiff either generally or for Life: the Remainder will be "to the "Male Heir by him;" that is, to the Heirs Male of his Body; which would make an Estate Tail in the Plaintiff; as it is settled, that the Words "Heir" or "Heir Male of "his Body," in the singular Number, are Words of Limitation, not of Purchase; unless Words of Limitation are super-added (a), or there is something in the Context to shew, that the Testator did not mean to use the Words in their technical Sense. But there is nothing in the Context of this Will, from which that can be collected. Here is an Absence of every Circumstance, that has commonly been relied on as shewing such Intention. The Word is "Heir," not "Issue:" there is no express Estate for Life given to the Ancestor; no Clause, that the Estate shall be without Impeachment of Waste; no Limitation to Trustees to preserve Contingent Remainders; no Direction so to frame the Limitation, that the first Taker shall not have the Power of barring the Intail. Every Thing is wanting, that has furnished Matter for Argument in other Cases. The Words are therefore to be taken in their legal Acceptation.

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"Heir" or "Heir Male of "the Body," in the singular Number, Words of Limitation, not of Purchase: unless Words of Limitation super-added, or the Context shews, that those Words are not used in their technical Sense; as the Word "Issue" or "without "Impeachment "of Waste:" a Limitation to Trustees to preserve Contingent Remainders: or a Direction so to frame the Limitation, that the first Taker shall not have the Power of barring the Intail.

The Consequence is, that I must declare the Plaintiff entitled to have the Conveyance made to him in Tail Male.

(a) *Archer's* Case, 1 *Co.* 66.

LINCOLN'S INN HALL.
1814,
Feb. 22.

HILL v. TURNER.

Defendant, in Custody under an Attachment, and a Messenger ordered, discharged on putting in his Answer; but on Exceptions allowed the Plaintiff, not having accepted the Costs, resumes the Process, where it stopped: if Costs were accepted, he begins again.

Costs on Motion against settled Practice.

ON the 9th *December*, 1813, an Order was obtained for a Messenger on a Return of *Cepi Corpus* to an Attachment for want of an Answer. On the 11th of *December* the Answer was filed. The Costs not having been paid, the Amount being disputed, Exceptions to the Answer were allowed by the Master on the 7th *February*; and the Plaintiff then obtained an Order for a Messenger; under which the Defendant was in Custody.

A Motion was made by the Defendant, that the Order of the 9th of *December* might be discharged for Irregularity, and that the Defendant might have a Month's Time to answer the Exceptions.

Mr. *Richards*, and Mr. *Daniel*, for the Motion.

Mr. *Hart*, and Mr. *Shadwell*, for the Plaintiff.

The Lord CHANCELLOR.

The Practice, as settled by me *(a)*, has been long acted upon, that a Defendant, in Contempt for want of an Answer, putting in an Answer, though ever so insufficient, is entitled to be discharged; as the Court will not deprive a Man of his personal Liberty during the Inquiry, whether his Answer is sufficient. If the Plaintiff chooses to accept the Costs, and the Answer is afterwards reported insufficient, he must begin with fresh Process: but, where,

(*a*) *Boehm* v. *De Tastet*, *Blofield*, *ante*, 100. *ante*, Vol. I. 324, *Smith* v.

having

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having said, he will take the Costs, if tendered, he afterwards thinks proper to refuse them, the Consequence, established by the constant Course, is, that, the Answer being reported insufficient, he goes on upon the old Process; and there is a Principle of Justice in it: the Defendant being liberated merely as the Court gives him Credit, that the Answer is sufficient, until it is proved to be otherwise; but the Moment it is proved to be insufficient the Consequence is clear, that he never ought to have been released; and therefore the Plaintiff has a Right to go on upon the old Process.

As this is therefore a mere Question of Practice, which has been long settled, and repeatedly acted upon, the Defendant must pay the Costs.

1813, *Feb.* 24.

LIST's CASE (1).

Creditor, attending to prove his Debt before Commissioners of Bankruptcy, privileged from arrest.

The Plaintiff in the Action ordered to discharge him, and all Parties subjected to Costs.

THE petitioning Creditor under a Commission of Bankruptcy was arrested at *Guildhall*, as he was going out, immediately after proving his Debt at a public Meeting. There was no Doubt of Notice: the Attorney, who pointed him out to the Officer, having seen him prove his Debt; and he was taken back to the Commissioners; who stated to the Officer, that the Arrest could not be maintained: but he persisted. An Application was made to a Judge, Sir *S. Le Blanc*; who refused to discharge; as was asserted on one Side, upon Consideration of the Authorities; on the other merely as not having Jurisdiction.

(1) 2 *Rose*, 24. *Ex parte Bryant*, 1 *Madd.* 49. See also *Ibid.* 580.

Sir

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List's Case.

Sir *Samuel Romilly*, and Mr. *Rose*, applying for the Discharge, under these Circumstances pressed for Costs against all Parties, the Attorney, the Officer, and the Client; contending, that this Privilege had been so long settled, that the Attempt to infringe it ought to be treated as a Contempt: the only Doubt upon it arising from the Opinion, expressed by the Court of *King's Bench* in *Kinder* v. *Williams* (*a*), that Commissioners of Bankruptcy are not a Court of Justice; which was corrected by that Court in *Arding* v. *Flower* (*b*), and by the *Lord Chancellor*, Ex parte *King* (*c*).

Mr. *Leach*, in support of the Arrest, made a Distinction between a Person, coming as a Witness to prove the Debt of another, and coming to prove his own Debt; to which Case he said, the Protection had not been extended.

The Lord Chancellor.

Privilege of a Witness from arrest: as a Person going to make an Affidavit before a Master.

If a Person, going to make an Affidavit before a Master, was arrested, this Court would discharge him: but a Judge would not; as the Application must be to that Court, of which the Proceeding is a Contempt.

The Application to discharge must be to the Court, of which the Proceeding is a Contempt.

The Cases, that have been decided, supposing there is no Instance of a Creditor attending to prove his Debt, as I think there is, have gone upon a Principle, that clearly reaches that Case. The Course in Bankruptcy is, that the petitioning Creditor must not only prove his Debt privately at the opening of the Commission, but must also make a second Proof at a public Meeting; and it is impossible to maintain, that a Creditor, who goes to give Evidence of his own Debt, does not stand precisely upon the same Principle

The petitioning Creditor under a Commission of Bankruptcy must prove his Debt at a public Meeting.

(*a*) 4 Term Rep. B. R. 377.

(*b*) 8 Term Rep. B. R. 534.

(*c*) 7 *Ves.* 312.

ciple as a Person, going to give Evidence of the Debt of any other Person. It is his Mode of suing. That is the Court, to which he must apply. There is no Doubt therefore of the Right of this Person to be discharged. In that Case, in which the Court of *King's Bench* over-ruled their own Doubt, they stated the Principle, upon which all Courts have since acted; and I have no Doubt, that the Principle reaches this Case.

1814. LIST's Case.

Therefore let the Plaintiff in the Action discharge him. All the Parties must be subjected to the Costs; and he may choose, whom he will follow.

1814, *March* 1.

MARSH *v.* SIBBALD.

Order for Production of Papers on a Trial at Law limited to those referred to by the Answer of the particular Defendant; and not extended to any other Answer except upon a Trial, directed by the Court; when the Production is more general.

MR. *Leach* on a Motion for the Production at the Trial of an Action of Books and Papers, referred to by the Answer, admitted, that the Motion went farther than any former Instance; as extending to a Book, referred to by the Answer of another Defendant, not the Plaintiff in the Action; such a Production having been ordered only in the Instance of a Trial directed by the Court; in which Case one Defendant would not be allowed to withhold Evidence from another.

The Lord CHANCELLOR.

The Rule as to producing Papers upon a Trial at Law is this. If this Court on Motion, or by Decree, directs a Trial, that Trial is directed in such a Way, that all Productions, which the Court conceives to be useful upon

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MARSH
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upon that Trial, the Creature of its own Direction, shall be made: but, if upon a Bill, filed for an Injunction against an Action, and praying Relief, the Injunction being refused, they go on at Law to Trial, the Plaintiff can only read by the Direction of this Court what he may read without that Direction, the Answer; and then he may read every Book, Letter, Memorandum, or Paper, referred to by that Answer; as every such Book, Letter, &c. is a Part of the Answer. It is read as being Part of the Answer; and the Plaintiff must shew, that what he prays may be produced is in Effect and Substance Part of that Answer; unless the Trial is directed by the Court itself on Motion, or by Decree: but there is no Instance of directing the Answer of any other Person except of the Defendant in that Cause, or any Part of it, to be read upon a Trial, not directed by the Court itself. If therefore this Book is not referred to by the Answer of the Defendant, I cannot order it to be produced; and you must get at it by amending your Bill. You are entitled to the general Production, in the usual Form, of all the Papers, referred to by the several Classes of Defendants, respectively, as Part of their Answers, for the general Purposes: but that will not answer your Object, without proceeding to order a Production at the Trial; and that is limited in the Manner I have stated.

Papers referred to by an Answer, read as Part of it.

BISCOE

1814,
March 4.
LINCOLN'S INN HALL.

BISCOE *v.* BRETT.

Order to dismiss a Bill for want of Prosecution not of course pending a Reference on Motion; the Title alone being in question.

THE Bill prayed the specific Performance of a Contract to purchase an Estate from the Plaintiff. The Answer insisted upon Objections to the Title.

Upon the Motion for an Injunction against proceeding at Law for the Deposit an Order was made on the 24th of *February*, 1813, upon the usual Terms directing a Reference to the Master upon the Title. The Master not having made his Report, the Defendant on the 15th of *January*, 1814, obtained the usual Order, of course, to dismiss the Bill with Costs for want of Prosecution. A Motion was made to discharge that Order.

Mr. *Wear*, in support of the Motion.

Mr. *Owen*, for the Defendant.

The Lord CHANCELLOR.

I take the Case to be simply this; that on the Answer it appeared to the Court, that the only Question was upon the Title. The Inconvenience of the old Practice, that a Cause under these Circumstances might take up two or three Years, before it got to a Hearing, led to the Experiment of a Motion for a Reference to the Master to look into the Title. That Experiment succeeded; and has established this Practice; where nothing but the Question of Title is in Dispute (*a*): but a more mischievous Prac-

(*a*) *Blyth* v. *Elmhirst*, *ante*, Vol. I. 1. *Balmanno* v. *Lumley*, *ante*, Vol. I. 224, where the Order was made before Answer.

tice

1814. Biscoe v. Brett.

tice never was introduced, if that Order is not to have all the Effect of a decretal Order: and I desire it to be clearly understood, that, whenever such an interlocutory Order has been made, the Plaintiff shall not turn round, and dismiss his Bill of course; but shall be considered in the same Situation, as if a Decree to that Effect had been made on the Hearing of the Cause. In this Instance I think it not necessary to discharge the Order: but the Plaintiff shall be at liberty to proceed, as if no such Order had been made.

1814. Rolls, *Jan.* 27. *March* 21.

TAYLOR *v.* GEORGE.

Codicil, requiring and entreating the Executor, who was also residuary Legatee, by Will or Deed to settle and secure £500, to be paid at his Decease: the Testator declaring, that he had omitted to express it in his Will, not doubting, that the Executor will readily comply with the Request; a Trust, by Way of Legacy out of the Assets: not a Condition imposed, independent of them.

CHARLES *Rogers* by his Will, dated the 20th of *May*, 1806, and duly executed, gave all his Freehold Estate to his Brother *William Rogers* for Life, without Impeachment of Waste; with Remainders over; charged with his Mortgage Debts; exonerating his personal Estate from those Debts; and he bequeathed all his personal Estate to his said Brother, subject to the Payment of certain Legacies; nominating his said Brother sole Executor. The Testator also made a Codicil of the same Date, signed by him, but unattested, in the following Words:

"I do hereby require and entreat my dear Brother that "he will either by Will or Deed settle and secure the "Sum of £500 to be paid at his Decease to my Relation "Mrs. *Elizabeth Taylor* Wife of Mr. *Taylor* of the City

"of

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"of *Bath* Attorney at Law and also the Sum of £500
"between the Children of my Relation Mrs. *Jane Simes*
"Wife of Mr. *Simes* of the said City of *Bath* Attorney
"at Law to be divided between them in such Proportion
"as the said Mr. *Taylor* shall think fit. I have omitted
"to express the above in my Will not doubting but my
"dear Brother will readily comply with the Request."

William Rogers proved the Will, but not the Codicil; and, having possessed the Testator's real and personal Property, and secured the Payment of £500 to the Children of Mrs. *Simes*, died; not having paid or secured the other Sum of £500 to Mrs. *Taylor*.

The Bill, filed against his Executor and residuary Legatee, prayed a Declaration, that the Plaintiff, as the legal personal Representative of *Elizabeth Taylor*, deceased, is entitled to receive the Legacy of £500, and Payment accordingly.

The Answer insisted, that the Testator *Charles Rogers* did not leave Assets: that *William Rogers* did not prove the Codicil, considering the Recommendation not to be imperative; and that he had paid the other Legacy as an Act of Kindness.

Sir *Samuel Romilly*, and Mr. *Roupell*, for the Plaintiff.

The Question is, whether the Codicil gave £500 to Mrs. *Taylor*, as a Legacy; or whether the Payment of that Sum was imposed on the Executor and residuary Legatee as a Condition, on which he took the Residue; making it incumbent on him, however small the Benefit he derived under the Testator, to answer that Sum of £500 personally. The latter is the true Construction; and the

Case

1814. TAYLOR v. GEORGE.

Case resembles a Devise of an Estate to a Man, paying a Sum of Money; which, in *Walker* v. *Collier* (a) was held a Fee; as the Devisee, on whom that Payment was imposed as a Condition, might die, before he was reimbursed.

Mr. *Hart*, and Mr. *Benyon*, for the Defendant.

The Defendant can only be charged as having possessed Assets. The Codicil, being of the same Date as the Will, shews, that the Subject was in the Testator's Contemplation, when he made his Will; into which he did not introduce these Legacies; meaning to leave them to his Brother's Generosity: not aware of the Import of the Words "require and entreat;" which, it is now too late to deny, are legatory and imperative (b) on an Executor; a Doctrine derived from the Civil Law. The Effect of such Words however must, as an express Legacy, depend upon the Assets.

The MASTER *of the* ROLLS.

March 21. It was contended for the Plaintiff, that this was a Condition imposed upon the Brother, and not a Legacy given out of the Testator's Assets; and that having taken the Benefits, given him by the Will, he was bound to perform the Condition. The Consequence would be a Decree for the Payment of this Money without regard to his having, or not having, received sufficient Assets of the first Testator; and that was my first Impression: but afterwards, entertaining some Doubt, I desired, that it should

(a) *Cro. Eliz.* 379.

(b) *Malim* v. *Keighley*, 2 *Ves.* jun. 383. 529.

be

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be again spoken to; and my Opinion now is, that this is, not a Condition, but a Trust. The Words would clearly raise a Trust, if applied to the Testator's Property: but it is not expressed distinctly, that these Sums are to be paid out of that Property. The Words however are not Words of Condition. I apprehend, a Direction given, or a Request made, to an Executor and residuary Legatee to pay a Sum of Money to another Person, must be considered as a Legacy to be paid out of the Testator's Assets. Taking this to be no Legacy, but a Condition, it would follow, that, if the Executor had died before the Testator, these Sums would not have become payable, for the Condition would never have attached; neither could the Court have secured these Legacies out of the Testator's Property. The Words are, "by Deed or Will:" so that, giving an equivalent Sum by his own Will, he would satisfy the Condition: and it is difficult to say, the Court would take from him the Option, and compel him to give an absolute Security. The Testator's Intention of Bounty to the Legatees is evident; and he could hardly mean to make it depend on the Contingency either of the Executor's surviving him, or leaving Assets to answer the Legacies. The Direction to settle and secure is not decisive, that the Testator meant these Sums to come out of his Brother's Property, and not out of his own.

Appointment of a Sum of Money by Will; the Appointee to pay an Annuity, and give Bond for the Payment. The Appointment lapsing by the Death of the Appointee in the Life of the Testator, the Annuity a Trust by Way of Legacy, not a Condition.

The Case of *Oke* v. *Heath* (a) is material as to this Point. The Testatrix by Will appointed under a Power £4000 to be paid to her Nephew for his own Use and Benefit; but in consideration thereof he to pay to his Mother an Annuity of £100 during her Life, and to enter into a Bond with a Penalty for the Payment: the Ap-

(a) 1 *Ves.* 135.

pointment

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pointment to the Nephew being void by his Death in the Life of the Testator, it was contended, that the Annuity was given, not as a Trust by Way of Legacy out of the Fund, but by Way of Condition; but Lord *Hardwicke* determined, that it was a Legacy. That is a stronger Case than this; as the Words more clearly imported Condition than these Words do.

This Plaintiff therefore is not entitled to an absolute Decree against the Estate of *William Rogers*; but can only have an Account of the Assets of the first Testator.

1814,
LINCOLN'S INN HALL.
Feb. 28,
Mar. 1. 8.

RAWLINS *v.* BURGIS.

Devise of the equitable Fee, under a Contract to purchase, revoked by the Conveyance to a Trustee and his Heirs to such Uses as the Devisor should appoint by Deed, with Two Witnesses, or Will; with Remainder to him for Life, to the Trustee for the Life of the Devisor, to bar Dower, and to the Devisor in Fee.

BY a Memorandum in Writing, dated the 15th of *May*, 1809, *Henry Smith* agreed to sell to *John Rawlins* an Estate at the Sum of 1000 Guineas, to be paid on the 29th of *September* next; when the Purchase was to be completed; and *Smith* agreed at his own Expence to make out a good Title in Fee-simple to the said Premises; free from Incumbrances, and also to be at the Expence of the Conveyances to *Rawlins*; and *Rawlins* agreed to pay the Purchase-money to *Smith*, and complete the said Purchase on such good Title being made, as abovementioned, on the 29th of *September* next.

Rawlins by his Will, dated the 3d of *July*, 1809, and duly attested, gave all his Property to his Wife *Sarah Rawlins*.

By Indentures, dated the 28th and 29th of *September*, 1809, *Smith*, by the Direction of *Rawlins*, in pursuance and Performance of the Agreement, conveyed to *Thomas Stanley*;

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Stanley; to hold to *Stanley*, his Heirs and Assigns, to such Uses, &c. as *Rawlins* should, by Deed with Two Witnesses, or Will, appoint or devise; with Remainder to the Use of *Rawlins* and his Assigns for his Life; and, after the Determination of that Estate, to the Use of *Stanley*, his Heirs and Assigns, during the Life of *Rawlins*, in trust for *Rawlins*, and to prevent Dower; with the ultimate Remainder to the Use of *Rawlins* in Fee.

Rawlins died on the 12th of *June*, 1811. By Indentures, dated the 30th of *June* and 1st of *July*, 1812, *Sarah Rawlins* conveyed to Trustees and their Heirs, upon Trust to pay Debts, and to make a Provision for her Children; and she filed the Bill; praying that the Defendants, the Heirs at Law of *John Rawlins*, may be declared Trustees of the legal Estate in Fee-simple for the Uses of the Deed of the 1st of *July*, 1812; and may convey accordingly.

Mr. *Leach*, Mr. *Treslove*, and Mr. *Preston*, for the Plaintiff, contended, that the Deeds of *September*, 1809, expressly made "in pursuance and Performance of the "Agreement," did not revoke the Will; the Devisor having done no Act, indicating a Change of Intention. They relied on the Opinion, expressed by Lord *Hardwicke* in *Parsons* v. *Freeman* (a), that taking the legal Estate after a Devise of the equitable Interest is no Revocation, and the Case of *Barker* v. *Zouch* (b).

(a) 3 *Atk.* 741. *Amb.* 116. 1 *Wils.* 308. See *Brydges* v. *The Duchess of Chandos*, *Williams* v. *Owens*, 2 *Ves.* jun. 417. 595. *Cave* v. *Holford*, 3 *Ves.* 650. *Harmood* v. *Oglander*, 6 *Ves.* 199. 8 *Ves.* 106.

(b) 1 Rep. Ch. 23. (Fol. Ed.)

Sir

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Sir *Samuel Romilly*, Mr. *Benyon*, and Mr. *J. Wilson*, for the Defendants.

The Question in all these Cases is, whether the Devisor took the same Interest by the Deed as he had previously in the legal Estate, or in the equitable Estate by the Contract. The Principle, as established by Lord *Hardwicke*, is well explained by Lord *Alvanley* in *Williams* v. *Owens*, thus (*a*):

"Wherever the Estate is modified in a Manner different from that, in which it stood at the Time of making the Will, it is a Revocation: but wherever the Testator remains with the same Estate or Interest exactly and disposable by the same Means, without any fresh Modification, there is no Revocation."

The Case of *Tickner* v. *Tickner* (*b*) is an Instance of the Distinction; and applies directly to this Case; and in *Kenyon* v. *Sutton* (*c*) Lord *Alvanley* with great Reluctance felt himself bound to follow that Authority. *Barker* v. *Zouch* is not Law; being inconsistent with many Determinations. That Case was decided at a Period, when the Doctrines of this Court were far from being settled or matured. The Intention of this Testator to revoke is clear. The Uses of the Conveyance being prospective, looking to a future Deed or Will. the Will, previously made, cannot be an Execution of the Power. At the Date of the Will the Devisor had the complete equitable Estate in Fee: the

(*a*) 2 *Ves.* jun. 599, 600.

(*b*) Cited in the Reports of *Parsons* v. *Freeman*, and in 2 *Ves.* jun. 600, by Lord *Alvanley*, from a Manuscript Note.

(*c*) Stated 2 *Ves.* jun. 601.

Interest

Interest he took by the Deeds was, independent of his Power of Appointment, merely an Estate for Life; with a Remainder in Fee: the Trustee's Estate being interposed; and the Object of that Estate interposed to bar the Wife's Right of Dower; to whom the whole Estate had been devised. Here is therefore clearly a different Modification of the Estate; and an Alteration of the Devisor's Interest, his Dominion, and his Intention.

The VICE-CHANCELLOR.

March 8.

The Point, whether the Plaintiff was entitled for Life, or in Fee, under the Will, has been properly abandoned; the Words being sufficient to carry a Fee. The only Question therefore is, whether the Will of this Testator was revoked by the Deeds of Lease and Release subsequently executed.

Devise not revoked by merely taking the legal Estate.

It has been long settled, that a Devise is not revoked by merely taking the legal Estate, doing no more. That Doctrine is stated in *Roll (a)*; and, though that Case is opposed

(*a*) 1 *Roll*'s Ab. 616, Pl. 3. See Mr. *Sugden*'s Observations (Law of Vendors and Purchasers, 148, Ed. 4) upon the Passage, 2 *Ves.* jun. 429, 430, relating to this Case.

It seems extraordinary, that such an Error should be imputed to Lord *Rosslyn* in his very able Judgment upon this Subject as the Conception, that a Feoffment to the Use of a Man before the Statute of Uses conferred the legal Seisin; or that the Fact was at variance with his Lordship's Statement, that the Feoffment was to *the Use of* the Devisor. As an Instance of a Decision at Law, that by *taking* the legal Estate a Devise is not revoked, his Lordship translates correctly and literally this Case from *Roll;* who states shortly the Ground, that after the Feoffment the Devisor had the Use, as before;

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opposed by *Putbury* v. *Trevilian* (*a*), no Doubt can now be admitted on a Point, that has been long at rest. The Question then is, whether any Thing more was done; or whether the Estate remained the same without Modification. In the Course of the Argument it has been insisted, that the Deed affords Evidence of an Intention to revoke: a Ground perfectly distinct from that, which arises from an Alteration of the Estate. That has had the Effect of Revocation, independent of Intention; and the actual Intention, clearly indicated, has in those Cases frequently been violated.

Distinction between Intention and Alteration of Estate, as the Ground of Revocation of a Will.

The Peculiarity of this Case arises from applying the Principles of a Court of Equity to an Estate, contracted for, but not actually conveyed. At Law the Contract creates a mere Right; but no Estate, on which the Will could operate: a Case, having no Analogy to that of an Estate, actually vested in the Devisor by Conveyance. It is not now to be disputed, that, if the Devisor, being at the Date of his Will seised in Fee, had subsequently made a Feoffment to such Uses as he should appoint, with Remainder to himself in Fee, that Feoffment would have amounted to a Revocation. The Reasons are expressed by the *Lord Chancellor* in *Maundrell* v. *Maundrell* (*b*); where the Distinction between *Luther* v. *Kidby* (*c*) and *Tickner* v. *Tickner* is clearly stated. The latter Case has been so

Revocation by Feoffment to such Uses as the Devisor shall appoint, with Remainder to himself in Fee.

Distinction, where Partition was the sole Object.

fore; guarding against any Inference from that Fact; and probably thinking it unnecessary to add the general Effect of the Statute, transferring the Seisin. To that Lord *Rosslyn* evidently points; meaning to represent the Case as amounting to an Authority for his Position; considering the Distinction as to the Mode of acquiring the legal Estate, whether by the Statute, or by Conveyance, immaterial.

(*a*) *Dy.* 142, b.

(*b*) 10 *Ves.* 264.

(*c*) 8 *Vin.* Tit. Devise, R. 6. Pl. 30. Stated 3 *P. Will.* 170, 2 *Ves.* jun. 600.

often

often recognized by Lord *Hardwicke*, Lord *Alvanley*, and Lord *Eldon*, that it is not now to be shaken.

With regard to the equitable Interest, created by the Contract, a Purchaser before Conveyance is in Equity Owner of the Estate almost to every Purpose: I qualify the Proposition; as before Payment of the Purchase-money he may be restrained from cutting Timber. If before Conveyance a House should be burnt down, the Loss would be his (*a*): if any Acquisition by Lives dropping should accrue, the Profit would be his: as between the Representatives of the Purchaser his Interest is considered as real Estate; and a Contract to sell a devised Estate has the Effect of revoking the Devise.

Purchaser before Conveyance the Owner in Equity for almost every Purpose; as to Profit and Loss, but before Payment may be restrained from cutting Timber. As between his Representatives, it is real Estate.

Revocation by a Contract to sell a devised Estate.

This Contract, under which the Devisor became equitable Owner of the Estate, and was to have a good Estate in Fee simple conveyed to him in the following *September*, is silent as to the Form of the Conveyance, except by those general Terms. The Conveyance therefore, which this Court would have directed, must have been of a pure, unqualified, Estate in Fee; the Contract pointing at nothing else. If the Vendor had tendered this Conveyance, the Purchaser would not have been bound to accept it; but might have objected, that the Estate was modified in a Manner different from his Contract. If then a Conveyance in Fee would have been a good Execution of the Contract, can this be so? Can an Estate, thus modified by the Introduction of a Power of Appointment, to be executed only before two Wit-

(*a*) *Paine* v. *Meller*, 6 *Ves.* 2 *P. Wms.* 682. 2 *Atk.* 273. 349. See 2 *Vern.* 280. 1 Eq. 635. 1 *Bro.* C. C. 156. Ca. Ab. 25. 1 *P. Wms.* 60. 7 *Ves.* 274.

 nesses,

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nesses, and a Trustee interposed, be represented as the same Estate, a mere Substitution of the legal for the equitable Fee, and therefore no Revocation, when the very slight Alteration of the Devisor's disposing Power in *Tickner* v. *Tickner* had that Effect?

The Argument, that the beneficial Interest remained the same, would overturn that Case. The Conclusion must be, that there was some Object beyond the mere Completion of the Contract by taking the legal Estate: the Case in that Respect, resembling *Brydges* v. *The Duchess of Chandos* (a); and differing from *Williams* v. *Owens* (b). The Consequence is, that the Estate, when the Purchaser died, was changed: it was no longer the same, that he had by the Contract; and consistently with all the Authorities the Effect is a Revocation.

The Bill was dismissed without Costs.

(a) 2 *Ves.* jun. 417. (b) 2 *Ves.* jun. 595.

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LINCOLN'S INN HALL.
March 8.

WRAY v. STEELE.

Resulting Trust by a joint Advance upon a Purchase in the Name of One.

THE Bill prayed, that the Defendant *Picker* may set forth his Claim in respect of the Third undivided Part of an Estate, conveyed by Indentures of Lease and Release to the Use of *Thomas Mackeness*, deceased, in Fee; and that a Commission may issue to make Partition.

The Answer, claiming One-third of the said Third Part, alledged, that at the Time of the Purchase of the Estate

Estate by *Mackeness* and *Steele*, it was agreed between *Mackeness* and *Picker*, that *Picker* should be jointly interested with *Mackeness* in the Purchase; and that they should pay their respective Proportions of the Purchase-money; and accordingly *Picker* paid to *Mackeness* £2189 : 11*s* : 10*d*. in Part of his Proportion previously to the Completion of the Purchase; and *Mackeness* advanced for *Picker* £1783 : 14*s* : 10*d*. the Amount of the Residue of *Picker*'s Proportion; who afterwards paid £400 in Part Payment of that Advance; and paid Interest on the Residue to *Mackeness*'s Death; receiving from *Mackeness* One-third of his Proportion of the Rents during the same Period; and as Evidence the Defendant produced an Account in the Hand-writing of *Mackeness*.

Mr. *Boteler*, for the Plaintiffs: Mr. *Bell*, for the Defendant *Picker*: Mr. *F. Cross*, for the other Defendants.

In the Course of the Argument the following Authorities were referred to: *Gascoigne* v. *Thuring* (*a*). *Anonymous Case* (*b*). *Dyer* v. *Dyer* (*c*). *Crop* v. *Norton* (*d*), and *Lake* v. *Craddock* (*e*).

The VICE-CHANCELLOR.

The Question is, whether there is a resulting Trust for *Picker* under the Circumstances of this Case. The Doubt arises from what Lord *Hardwicke* is represented to say in the Case of *Crop* and *Norton*; which is

(*a*) 1 *Vern.* 366.

(*b*) 2 *Ventr.* 361. 2 *Salk* 676.

(*c*) *Watk.* Copyh. 216.

(*d*) 2 *Atk.* 74. 9 *Mod.* 233. *Barnard.* 179.

(*e*) 3 *P. Wms.* 158.

reported

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reported rather differently in *Atkins* and in the Modern Reports.

The Rule was clearly settled by the Decision in *Ventris* (a), in the 35th of *Charles* the Second, about six Years after the Statute of Frauds passed; that, where one Man advances the Money to purchase an Estate, but the Purchase is made in the Name of another, a Trust arises for him, who paid the Money; that Case forming an Exception to the Statute of Frauds; and so long has that Decision been followed, that no Rule can be represented as more clear and incontrovertible. In *Dyer* v. *Dyer* Lord Chief Justice *Eyre* states the same Doctrine. It is said however, that the Case has never yet occurred of a joint Advance; and that in *Crop* v. *Norton*, the Application of this Rule is confined to an Advance by one Individual. As that Case appears reported, there is a Colour given to this Argument: but the Doctrine, laid down by Lord *Hardwicke*, must be understood with relation to the Case before him, not generally; and the Case appears to have been decided on another Ground; that there was a Deed-poll executed the Day after, constituting a Part of the Transaction; a plain Declaration of the Trusts in Writing by the Person having the legal Estate. That was a mixed Case: the Consideration consisting, not merely of Money, but also of the Surrender of the old Lease; and it was decided on the particular Facts; not on the general Principle. Lord *Hardwicke* could not have used the Language, ascribed to him. What is there applicable to an Advance by a single Individual, that is not equally applicable to a joint Advance under similar Circumstances? On these Grounds, I think, the Defendant *Picker* is entitled, if the Fact of his

(a) 2 *Ventr.* 361.

having

having advanced Part of the Purchase-money can be made out; and as to that there must be an Enquiry (1).

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1814, LINCOLN'S INN HALL. *March* 21.

TEMPLE, *Ex parte* (a).

The Crown not being bound by the Statutes of Bankruptcy, the Protection of a Bankrupt from an Extent limited to actual Attendance, upon the common Law Privilege of a Witness or Party; not extending through the Intervals of Adjournment by the Statute.

THIS Petition was presented by a Bankrupt; stating, that he had surrendered to the Commissioners; who had enlarged the Time for his last Examination by several Adjournments from the 4th of *January* to the 3d of *May*; and on the 12th of *March* the Petitioner was taken in Execution upon a Warrant of the Sheriffs of *London*, grounded upon an Extent, sued out by the Board of *Excise*, to satisfy His Majesty £2000, recovered against the Petitioner by Judgment in the *Exchequer*; that the Petitioner at the Time of his Arrest shewed the Officer the Summons under the Hands of the Commissioners; and claimed his Protection; but was carried to Prison. The Petition prayed, that the Sheriffs may be ordered forthwith to discharge the Petitioner out of Custody; that all Proceedings under the Extent may be quashed; and that the Petitioner may have his Costs.

Mr. *Wakefield*, for the Petitioner: Mr. *Montague*, for the Assignees.

The Statute (b), giving Protection from all Arrests to

(a) 2 *Rose*'s Bankrupt Ca. 22.

(b) Stat. 35 *Geo.* 2. c. 30. s. 5. *Ex parte Price, Post.*

(1) *Newton* v. *Preston*, Prec. Ch. 103. *Ryall* v. *Ryall*, 1 *Atk.* 59, and Mr. *Sanders*'s Note to 2 *Atk.* 150. *Riddle* v. *Emerson*, 1 *Vern.* 107.

 the

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the Bankrupt, has two Objects: to enable him to make a full Disclosure; and to shield him from the severe Penalty, imposed upon his omitting to do so. The Protection is therefore to promote the Ends of Justice, by giving him the Opportunity of making that Disclosure, which this Statute exacts from the Bankrupt at the Peril of his Life. It is said, your Lordship has not, as against the Crown, gone farther than to order the Discharge of a Bankrupt, arrested, when actually attending the Commissioners under their Summons, in the late Case *Ex parte Russell* (a): but that Decision stands only on the Presumption, that the Bankrupt was doing that, which the Law imposes upon him as a Duty: and that Law has declared the Protection to be as necessary, to enable the Bankrupt to collect his Information, in order to his making a full and free Disclosure of his Affairs, as during his Attendance to make that Disclosure. The only other Authority is the Observation of Lord *Hardwicke*, *Ex parte Dick* (b), that the Crown is not bound by the Bankrupt Laws. That general Objection applied equally to *Russell's* Case: the Commissioners having no Authority by the Common Law to summon the Bankrupt before them: but the Legislature, having expressly declared, that he shall be free from all Arrest, while preparing that full Disclosure, which is required from him under the Penalty of Death, has in Effect said, that no one shall during that Period infringe the Protection; and disable him from complying with that Requisition.

Sir *Arthur Piggott*, and Mr. *Hall*, for the Commissioners of *Excise*.

This Bankrupt, as he was not actually attending the Commissioners, when he was taken, had no Claim to Protection

(a) 1 *Rose*, 278. (b) 2 *Black.* 1142.

tection against this Extent. No Authority has against the Crown gone farther than discharging a Person arrested, when actually attending: that proceeding upon the general Principle of the common Law; that, whilst he is under the Exigence of the Order or Writ, requiring his Attendance, the Court will give him that Protection. Certainly, before that was decided, Doubts were entertained, whether under any Circumstances a Bankrupt was protected against an Extent: the Crown not being bound by the Bankrupt Laws: and the Rights of the Crown, Rights necessarily vested in the Crown for the Benefit of the Public, not being at all affected by those Laws. That Question however is now decided to the Extent of Protection during actual Attendance, but no farther. Is your Lordship prepared to say, that the Commissioners by adjourning an Examination for Six Months, a Period, which may be necessary to enable the Bankrupt to give that Satisfaction, which the Commissioners are bound to require from him, can place him in this State of Privilege and Protection; that the Rights of the Crown are to be dormant in all the Intervals of Adjournment; the Duration of which is entirely in the Discretion of the Commissioners; and is sometimes unlimited (*a*)? All these Observations in support of this Privilege would apply equally to a Witness, served with a Subpœna; that his Protection is necessary to the Ends of Justice; and, if the Subpœna is served a Week or a Month before the Trial, he is protected during all that Time. The Principle, upon which your Lordship extended the Protection against the Crown in *Ex parte Russell*, applying equally to a Witness or a Bankrupt, is, that he was in actual Attendance, for the

(*a*) *Ex parte Ross*, 1 *Rose*, 260. The Practice of adjourning the last Examination *sine Die*, to avoid the Necessity of committing, is certainly not universal; and cannot be justified. See Mr. *Christian*'s Observations, 2 *Christ.* Bankrupt Law, 184.

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Purpose of being examined; and, the Commissioners finding it convenient to adjourn the Examination until the Evening, he was still attending for that Purpose; as in the Case of a temporary Adjournment of a Court of *Nisi Prius* the Witness attending would be equally under the Protection of the Court in the Evening, as he was in the Morning.

The Lord CHANCELLOR.

(a) The Opinion of Lord *Hardwicke*, which, I see, I followed in the Case *Ex parte Russell,* was, that the Crown is not bound by the Statutes of Bankruptcy, and it would require a great deal of Argument to satisfy me, upon the Ground, mentioned in the Note (*b*) referred to, that the Crown is to be taken by Implication to be bound by this Section of 5 *Geo.* 2. when judicial Proceedings have from the Time of Lord *Hardwicke* down to the present Time established in Practice, as well as declared in Principle, that the Crown was not bound by that Statute. In the Case *Ex parte Russell* the Application was made under Circumstances, in which, I conceive, the Court ought to interpose; and I certainly carried that Notion of the Law a great deal farther than it was ever before carried, when I held the Bankrupt to be protected against the Crown, while he could be said to be *bonâ fide* in the actual Execution of the Duty of going through his Examination, and actually attending the Commissioners for that Purpose; but neither the Facts of that Case, nor what I stated, admit any Implication, that the Crown was bound by this Statute; and that in Obedience to the Statute the Officer, arresting on the Part of the Crown, was bound to discharge the Man: on the contrary, I anxiously stated my Opinion, that the Crown was not bound by this Statute; and grounded the Relief I gave against the Crown upon the Principles of the Common Law.

(*a*) *Ex Relatione.*

(*b*) 18 *Ves.* 3.

Considerable

Considerable Doubt had long prevailed, whether Attendance on Commissioners of Bankruptcy was Attendance on a Court, that would entitle the Party to the Privilege, independent of this Statute; and the Court of *King's Bench* hesitated very much, before they came to that Conclusion; but in Lord *Kenyon's* Time that Court, as I think, very properly held (*a*) on strict legal Principles, that a Person, actually in Attendance on the Commissioners, was entitled to the same Privilege as a Witness; and that, where a Person was compelled by the Process of any Court, or by a Summons, which any Persons in the Situation of Commissioners were authorized by Act of Parliament to issue for the Purpose of calling a Party before them, being before them he was protected; and it was carried to this Extent; that, whatever Doubts might formerly have existed, a Witness, actually attending Arbitrators upon an Arbitration under an Order of Court, was just as much protected as a Witness attending a Judge at *Nisi Prius*. That was not under this Statute, but upon Principles of the Common Law.

Witness, attending Arbitrators upon an Arbitration under an Order of Court, protected from Arrest.

If the Statute of *Geo.* 2. had not passed, no Person could dispute, that a Bankrupt might have been arrested between the Days of Examination. That Statute, preventing the Creditors from arresting, as it does not bind the Crown, affords no Principle, upon which I can interpose in this Case; and, taking it upon the Principle of the Common Law, that has never been carried to the Extent now contended. My Opinion is therefore, that this Bankrupt is not entitled to his Discharge; and, that the Circumstances of the Case referred to afforded a Distinction, that justified the Discharge in that Instance. Those Circumstances were, that the Man was attending the Commissioners: it was upon the same Day, in the same

Protection from Arrest during Attendance through an Interval of Adjournment to another Period of the same Day, at the same Place.

(*a*) *Arding* v. *Flower*, 8 Term Rep. 534.

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same House: a Person who was to come to Town, if I recollect rightly, not having arrived, the Commissioners, therefore, did not go on with the Examination; but waited for his Arrival. That appeared to me to be all one Attendance; as a Witness is found walking about *Westminster Hall,* until called into Court to give his Testimony.

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Feb. 3.
March 21.

SOUTHOUSE *v.* BATE.

General Devise and Bequest to Executors, having equal Legacies of Stock for Mourning, their Heirs, Executors, &c. on the especial Trust to devote all, both real and personal, to Debts, Legacies, and Annuities, a resulting Trust of the Residue.

EDMUND *Edward Southouse* by his Will, dated the 25th of *September,* 1811, giving two Legacies of £100 each to *John Forbes* and *Myra Southouse,* to be paid over by them to certain Charitable Institutions, and equal Legacies of Stock to them for Mourning, proceeded as follows:

"I give and bequeath unto my Brother-in-Law *John* "*Forbes* and to my Sister *Myra Southouse* all my Pro- "perty both real and personal upon this especial Trust "that they pay regular the following Annuities."

The Testator then, giving some Annuities, and disposing of his Clothes and Furniture, concluded his Will in the following Words:

"I do hereby appoint *John Forbes* my Brother-in-Law "and *Myra Southouse* Spinster my Sister both late of "*Northampton* Executors of this my last Will and "Testament and their Heirs Executors and Administrators "upon this especial Trust and Confidence that they "devote all my Property both real and personal to pay- "ment of my just Debts and all the Legacies and "Annuities given by me in trust to them."

The

The Bill, filed by the Executrix *Southouse*, prayed a Decree for the Residue of the Testator's Estate real and personal to the Plaintiff and the Defendant *Forbes*, beneficially in equal Moieties.

Sir *Samuel Romilly*, and Mr. *J. Stephen*, for the Plaintiff: Mr. *Garratt*, for the Defendant *Forbes*.

The Words "Trust and Confidence" in this Will cannot be understood in the common Sense. The Trust they had to perform being to pay Debts, Legacies, and Annuities, a Trust not at all applicable to real Estate, the Clause must be read, with reference to that Distinction, as a Disposition to these Persons of the real and personal Estate, but as to the personal upon the Trust declared, and particularly marked by the Term "especial." The Case of *Dawson* v. *Clark* (a) is precisely analogous; and cannot be distinguished from this. The Property is not given to them in the Character of Executors. The Decree in the Case of *Dawson* v. *Clark* was upon the Appeal affirmed by the *Lord Chancellor* on their Right, not as Executors, but as Legatees and Devisees.

Mr. *Bell*, Mr. *Blake*, and Mr. *Cross*, for the Coheiresses at Law, and the next of Kin, cited *King* v. *Dennison* (b), referring to most of the Cases upon the Doctrine of resulting Trust; and contended, that the last Clause of the Will brought this Case within the Distinction, taken by the *Lord Chancellor*; and, the whole Property being given expressly upon Trust, though the Trust declared is confined to a particular Part, it was impossible to separate the Trust from the Devise.

(a) 15 *Ves.* 409. 18 *Ves.* 247.

(b) *Ante*, Vol. I. 260.

The

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The MASTER *of the* ROLLS.

The Question, arising upon this very obscure Will, is, whether the Devisees of the real and personal Estate take beneficially, or only in Trust. The general Principles, applicable to Cases of this Kind, are so clearly laid down by the *Lord Chancellor* in *King* v. *Dennison* (*a*), that it is quite unnecessary to repeat them here. The Difficulty lies in their Application to the various Modes of Expression, employed by Testators to convey their Meaning.

Upon the first Part of this Will it was contended, that, as the Trust declared was not at all applicable to real Estate, but only to a particular Portion of the personal Estate, the Devise ought to be read thus,

"I give and bequeath to *John Forbes* and *Myra* "*Southouse* all my Property both real and personal but "as to my Funded Property on this especial Trust and "Confidence &c."

On the other Hand it was contended, that it is impossible so to separate the Trust from the Devise; that the whole Property is given expressly upon Trust; though it be only as to a particular Part of it that any Trust is declared. The Ambiguity, however, that there is in this Part of the Will, seems to be removed by the concluding Clause, declaring, that the whole is given in Trust for the Payment of Debts, Legacies, and Annuities. It is therefore impossible, that the Devisees can take any Part beneficially. A Distinction was attempted to be made with respect to the personal Property, in favor of the Executors, on the Ground of my Opinion in *Dawson* v. *Clark* (*b*). I do not know, whether upon

(*a*) *Ante*, Vol. I. 260. (*b*) 15 *Ves.* 409.

the

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the Appeal the *Lord Chancellor* meant absolutely to overrule that Opinion: but from the Note, with which I have been furnished, it is clear, that he did not concur in it. Had I been aware, that it would have been thought liable to so much Doubt, I should have stated more fully the Reasons, upon which, I thought, and still think, that the Executors, as such, would have been entitled, even if it had been decided, that they did not take by the direct Bequest.

But there is no opening for the Discussion of such a Question here, as these Persons are expressly appointed Executors in Trust; and equal Stock Legacies are given to them; and, though these are for Mourning, that has been in some Cases held sufficient to turn Executors into Trustees. They are therefore Trustees both of the real and personal Estate; and all the Co-heiresses are entitled to the one; and the next of Kin to the other.

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Commission of Bankruptcy, and the Affidavit, describing the Bankrupt only as a Waterman, supported by the Statement, that he got his living by buying and selling.

The Practice of issuing Commissions of Bankruptcy upon loose Affidavits as to the Trading disapproved.

THE Petition stated, that on the 3d of *March*, a Commission of Bankruptcy issued against *William Hookham;* under which he had not yet been declared a Bankrupt; that the Commission and the Affidavit of Debt described him only as a Waterman; that the Peti-

tioner,

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tioner, a Creditor for £105, is ready to prove *Hookham* a Trader and a Bankrupt; and had for that Purpose made the usual Affidavit and entered into the usual Bond; in which a Trading is described.

The Petition prayed, that the Commission may be superseded; and that another Commission may issue.

Sir *Samuel Romilly*, in support of the Petition, said, that the Description of Waterman, standing alone, was not sufficient to support a Commission of Bankruptcy; as the usual Words "Dealer and Chapman" were wanting in this Commission.

Mr. *Agar*, for the petitioning Creditor.

"Dealer and "Chapman," a sufficient Description of trading to support a Commission of Bankruptcy.

The Lord CHANCELLOR said, that according to Mr. *Cooke* (*a*) "Dealer and Chapman" had been held a sufficient Description of Trading; and, though the Practice of issuing Commissions upon Affidavits as loose as this, was so inconsistent and dangerous, as perhaps to require Correction by some general Order, the general Statement of the Commission, that the Bankrupt got his living by buying and selling, was sufficient to support it.

The Petition was dismissed.

(*a*) 1 *Cooke*'s Bankrupt Law, 4c, Edition 6.

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MURRAY *v.* SHADWELL (1).

ISSUE being joined in this Cause, upon a Bill, filed against three Trustees, charged with Breaches of Trust, the Defendant *Ann Murray* presented a Petition at the *Rolls*; stating, that the Defendant *Shadwell* was a material Witness for her; and, though interested in the Matters in question in the Cause, no way interested in the Points, to which she was desirous of examining him; praying, therefore, that she might be at Liberty to examine him as a Witness for her, saving all just Exceptions. At the same Time the Defendant *Shadwell* presented a similar Petition for liberty to examine the Defendant *Ann Murray*.

Order for examining a Defendant by a Co-defendant on the Allegation of no Interest in the Matter, to be examined to: that being the true Construction of the general Form, that he is not interested, or not in the Matters in question in the Cause; and any Objection to his Evidence must be taken at the Hearing.

An Order having been obtained, as of course, on each Petition, a Motion was made that the Order for examining the Defendant *Murray* may be discharged with Costs. This Motion, having been argued before the *Lord Chancellor*, was re-argued before his Lordship, assisted by the *Master of the Rolls*.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Dowdeswell*, for the Plaintiff, in support of the Motion.

Jan. 23.

This Order, obtained on an Allegation, that the Defendant is not interested in the Matter, to which she was to be examined, though interested in the Matters in question in the Cause, is contrary to the Practice of the Court; which requires an Allegation, that the Party is not interested

(1) *Lee v. Atkinson*, 2 *Cox*. 413.

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terested in the Cause (a); going to this Extent, that one Defendant cannot examine another, having an Interest in the Cause, though not interested in the Matter, to which he is to be examined. Conclusive Evidence of this is afforded by the Form of the Order; and it is analogous to the Rule at Law; where a Party, against whom an Indictment has been found, cannot examine another Person, comprehended in the same Charge, or even in a Part of it. The Objection, that the Court cannot on Motion enter into this Question of Interest, would introduce great Injustice. At Law an Objection to a Witness, as interested, is always taken in the first Instance. Another Difficulty is, how can the Court in this Stage ascertain such partial Interest? If either of these Defendants is not interested, why was not Advantage taken of it by Demurrer? The Plaintiff is in this Situation: either he must take such Evidence as the Defendant will give; or by cross-examining must waive all Objection to the Evidence. The Court, if apprised of these Circumstances, would never have made the Order; especially as there is not to be found one Precedent of an Order founded on such an Allegation as this.

Mr. *Leach*, and Mr. *Roupell*, for the Defendants.

Admitting, generally, that the Practice may be collected from the Form of the Order, when the Question

(a) See *Phillips* v. *Duke of Bucks*, 1 *Vern.* 227. 2 Ca. Ch. 214, Note. *Mayor of Colchester* v. ———, 1 *P. Wms.* 596. *Casey* v. *Beachfield*, Prec. Ch. 411. *Gilb.* Eq. Rep. 98, and 1 Eq. Ca. Abr. 225. pl. 8. (Ed. 1739) S. C. *Harris.* Pract. (Ed. *Newl.*) 275. *Hind's* Pract. 356. *Newl.* Pract. 134. and the late Case, *Franklyn* v. *Colquhoun*, 16 *Ves.* 218. See *Man* v. *Ward*, 2 *Atk.* 228.

of

of Interest arises upon an Application of this Kind, the only Inquiry can be, whether the Party is interested, or not, in the Matter, upon which he is to be examined. The Course at Law to strip a Defendant of that Character, before he can be examined by his Co-defendant, arises from the Peculiarity, that the Interest is necessarily general, where only one Point in issue. The Proceedings here necessarily differ; as a Man may be interested in one Part of a Cause and not in another, from the frequent Union of distinct Rights in the same Cause. How great would be the Injustice, if a Plaintiff by making a mere Witness a Defendant could deprive another Defendant of the Advantage of that Witness's Testimony! Here is no Difficulty in separating the Evidence; confining it to those Questions, which do not touch his Interest. There is no Instance certainly of going into this Inquiry before the Hearing; and that is necessarily the proper Time; as the Fact, whether the Defendant is interested, or not, can be properly decided only upon the whole Evidence, taken together. The Objection, that the Plaintiff, uncertain, whether the Defendant is interested, has a Difficulty in cross-examining him, occurs in every Case; a Consequence of the imperfect Mode of examining in this Court; which is avoided by a *vivâ voce* Examination; on which the Witness may be asked as to his Interest. The Motion, on which this Order was obtained, is a mere Motion of course; and the Suggestion is not open to Inquiry; as on other Motions of course, for farther Time to answer, to dismiss a Bill, &c. on which the Suggestion, depending upon some extrinsic Fact capable of being ascertained by Affidavit, or by reference to the Record, may be examined. The Form of the Order is not material. The Words "saving just Exceptions" reserve to the Plaintiff the Right of objecting to the Evidence at the Hearing; and there is no Rule, that one Defendant may not

 examine

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examine another, who is interested in the Cause. As an Instance of the Mischief from rejecting the Evidence at this Stage, suppose the only Witness to a Deed was a Co-defendant, having perhaps an Interest in another distinct Branch of the Cause. The Cause will be decided by rejecting the Evidence of *Shadwell;* whose Evidence is the single Support of the Defence. In *Nightingale* v. *Dodd* (*a*) the Plaintiff having examined a Defendant as a Witness, a Decree was made against him upon other Matters; the Court taking the Distinction, that the Interest must relate to the Matters, to which he is examined; and the Case of *Piddock* v. *Brown* (*b*) is an Instance of the Objection taken to reading the Depositions at the Hearing.

1812, *Dec.* 16.

The Lord CHANCELLOR.

This is a Motion to discharge with Costs an Order for one Defendant to be at Liberty to examine another Defendant as a Witness, saving all just Exceptions; as having been obtained upon the Allegation, that she was not interested in the Matters, to which it was proposed to examine her; though materially interested in the several Matters in question in the Cause.

The Motion was made upon this Ground; that the usual Form of Application is upon an Allegation, that the Defendant is not interested: sometimes so stated simply; and also in the Order, made upon that Allegation: in other Precedents, that I have seen, the Allegation is, that the Defendant is not interested in the Matters in question in this Cause: the Order reciting that Allegation; which, in whatever Terms expressed, must

(*a*) *Ambl.* 583. (*b*) 3 *P. Wms.* 288.

really

really mean, that the Party is not interested in the Matter, to which he is to be examined.

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The Application, which is the Subject of this Motion, was by Petition; stating, that this Defendant is not interested in the Matters, to which it was proposed to examine her; and the Recital in the Order follows that. No Precedent has been furnished to me, in which the Allegation of the Petition was simply, that the Defendant was not interested in the Matters, to which he was to be examined; and of course there is no Precedent of an Order, containing that Species of Recital. The Reason, upon which the Court permits one Defendant to be examined for another, is, that, if the Plaintiff joins Persons in a Suit, in which he has Cause of Suit against one as to one Subject, and against another as to a different Subject, but having no Cause against them jointly, unless the Court permits this Species of Examination, the Plaintiff, making both Defendants in the same Suit, would by that Sort of Mechanism deprive one of the Benefit of the other's Evidence.

Ground of permitting Defendant to be examined for a Co defendant, that the Plaintiff might unite distinct Claims with the View of depriving the Parties of each other's Evidence.

The general Practice, requiring either a general Allegation of no Interest, or of no Interest in the Matters in question in the Cause, which amounts to the same Thing, arises from this; that, though the Defendant may have no Interest in the Matters, to which it is proposed to examine him, directly, it is yet very possible, that in the Result of the Cause he may have an Interest in other Matters; which may be affected by the Examination: perhaps a Benefit by the Examination to those Points, in which he has no Interest. The Case may be so com-

Ground of the Practice, requiring for the Examination of a Defendant by a Co-defendant a general Allegation of no Interest, or none in the Matters in question in the Cause, that though he may have no direct Interest in the Subject of Examination, he may in the Result have an Interest in that Subject, the Effect perhaps of that Examination.

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1812.
MURRAY
v.
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plicated, that, if the Defendant does not choose to demur for Multifariousness, it may take such a Turn, that, though he has no direct Interest in the Matter to be examined to, he may derive an Interest in the Decision of those Matters from the Fact, that he may be affected in the Result of the Cause by his Examination as to those Matters, in which he has no Interest. The Court has therefore called for a Pledge, that the Defendant, proposed for Examination, is not interested in the Matters in the Cause; and finally there is no Prejudice: the real Meaning of the general Allegation being, that he has no Interest in the Matters, to be examined to: but, if in the Result of the Cause it turns out, that he has an Interest in those Matters by reason of his Interest in the others, the Depositions would not be read. My Opinion is, that it is better to adhere to the old Form; unless Precedents of this new Mode of Allegation and Recital can be produced.

1814,
March 31.

The Lord CHANCELLOR declared the Opinion of himself and the *Master of the Rolls*, that a Defendant may be examined, if not interested in the Matter, to which he is to be examined; and the Objection, if any, must be taken at the Hearing; that this is the true Construction of the Orders and the Practice; and any other Course would be attended with the greatest Inconvenience.

STEVENSON

1814,
Lincoln's
Inn Hall.
March 21.
April 7.

STEVENSON *v.* ANDERSON.

Interpleader upon opposite Claims.

Interpleader; all the Defendants but one residing out of the Jurisdiction, in *Scotland.* The Plaintiff, after a reasonable Time, having used due Diligence to bring them in, being decreed to give up the Subject to the only Defendant appearing, protected afterwards against the others by Injunction, and Order, that Service on the Attorney should be good.

Bill of Interpleader sustained upon Bills of Exchange, received by the Plaintiff, as Agent to procure Payment for his Principal, in *Scotland*, to whom they were remitted against an Order for Goods, pursued in an Action of Trover by the Party, who so remitted them, and by Attachment in *Scotland* by a Creditor of that Party.

THE Bill stated, that the Defendant *Anderson* on the 13th of *September*, 1812, ordered Goods from *James* and *John Goodall*, his Correspondents in *Scotland;* and, to indemnify them, remitted four Bills of Exchange, amounting to £166 : 16*s* : 5*d*. accepted by different Persons, and indorsed by *Anderson.*

Thomas Dick, of *Dundee*, in *Scotland*, claiming as a Creditor of *Anderson*, having instituted Proceedings against him for that Debt before the Lords of Session in *Scotland*, served the *Goodalls* with Letters of Arrestment upon any Property of *Anderson* in their Hands, to the Amount of £150 Sterling, and attached the Bills of Exchange in their Hands, *Anderson* wrote to the *Goodalls*, desiring to have the Bills returned to him; and having also demanded them from the Plaintiff, to whom they had been sent for the Purpose of procuring Payment, on his refusing to deliver them up, commenced an Action of Trover.

The Bill prayed, that *Anderson*, and the *Goodalls* and *Dick*, who were out of the Jurisdiction, should interplead as to the said Bills of Exchange, and an Injunction.

The Defendant *Anderson*, having put in a Demurrer for Want of Equity, that Demurrer, came on with a Motion

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to discharge the *Vice-Chancellor's* Order granting an Injunction on bringing the Bills into Court.

Mr. *Hart*, and Mr. *Cooke*, for the Plaintiff.

It is not necessary, in order to sustain a Bill of Interpleader, that Actions should be commenced: it is sufficient that contradictory Claims are set up: *Langston* v. *Boylston* (*a*). This, which is also the Case of a mere Agent, has the Peculiarity, that two of the Defendants reside out of the Jurisdiction: but that Circumstance affords no Distinction; as according to *Bourke* v. *Lord Macdonald* (*b*), followed by *Scott* v. *Hough* (*c*), the Process of this Court may be served in *Scotland*. It is true, Mr. *Erskine*, in his Institutes (*d*) says, that Bills of Exchange are not attachable by the Laws of *Scotland*: but Mr. *Bell* (*e*) shews, that this is not to be received absolutely;

(*a*) 2 *Ves.* jun. 101.

(*b*) 2 *Dick.* 587.

(*c*) 4 *Bro. C. C.* 213. *Shaw* v. *Lindsay*, 18 *Ves.* 496. See *Vaughan* v. *Evans*, 1 *Str.* 630. 8 Mod. 374. 2 *Ld. Raym.* 1408.

(*d*) B. 3. T. 6. S. 7. p. 472. (2d Ed.) "There are some "Subjects, which though "they be moveable, cannot "be arrested: First, Bills; "for these being considered "as Bags of Money, which "pass from Hand to Hand, "cannot be affected with any "Burden in the Person of "the Possessor." p. 589. S. 7. (5th Ed.)

(*e*) *Bell's* Com. 472. "Where the Debt is due by "Bill, Distinctions have been "taken; and the Doctrine of "*Erskine* is not to be re-"ceived absolutely (*a*): it "is true, that against one-"rous Indorsees, receiving "the Indorsation *bona fide*, "Arrestment can have no "Effect; but where the In-"terest of a third Party does "not interfere, there are se-"veral Cases in which Ar-"restment is a regular Di-"ligence for attaching the "Debt. Thus, where Bills "are placed with an Agent "or Factor, in order to re-"cover Payment of the Con-"tents

(*a*) *Ersk.* B. 3. Tit. 6. S. 7. Page 472. (Ed. 2.)

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solutely; that Bills may be attached in the Hands of a Person, entrusted, as the *Goodalls* were. Admitting, however, that to be questionable, the Plaintiff should not be put to the Difficulty of agitating that Question; especially as a Judgment in *Anderson's* Action of Trover would be no Answer to an Action brought by the *Goodalls* against the Plaintiff in respect of these Bills.

Sir *Samuel Romilly*, and Mr. *Trower*, in support of the Demurrer.

This Bill of Interpleader is of the first Impression; by a Person having no Money in his Hands, but holding these Bills as an Agent to procure Payment: instead of which he files this Bill; hazarding by the Delay the Loss of their Amount.

Another Novelty in this Case is, that the Persons, with whom *Anderson* is called upon to interplead, are not within the Jurisdiction; which was held a fatal Objection by your Lordship in a late Case: some of the Defendants residing at *Hamburgh*. This under the Pretence of Interpleader is really a Bill against *Anderson* alone; and the Object to compel him to involve himself in a Litigation in *Scotland*.

This in Truth is the Suit of the *Goodalls*; and the Court has a Right to the Security of their Affidavit, that they do not collude with the Plaintiff, to whom they have handed over these Bills.

" tents, a Creditor of the Person, to whom the Agent or Factor is accountable, may effectually arrest in the Hands of the Person, &c. intrusted. But where Bills are deposited as *corpora*, it does not appear, that Arrestment is an effectual Diligence to attach them." *Bell's* Commentaries on the Laws of *Scotland*, 472.

The

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STEVENSON v. ANDERSON.

As to the Propriety of the Affidavit to an interpleading Bill denying the Knowledge of the Defendants, *Quære.*

The Lord CHANCELLOR observed upon the Form of the Affidavit, attending a Bill of Interpleader, in *Harrison's* Practice (*a*), that it seemed to go too far in stating, that the Bill was filed without the "Knowledge" of either of the Defendants. His Lordship farther observed, that he should be sorry to say, a Bill of Interpleader could in no Instance be maintained, where one Defendant only was within the Jurisdiction; recollecting, though unable at the Moment to refer to Instances, that such Bills had been sustained for a reasonable Time; and the Plaintiff, having used due Diligence to procure Appearance, obtained Relief by Injunction; the Residence of two Defendants out of the Jurisdiction was not therefore a conclusive Answer to the Bill.

The Lord CHANCELLOR.

April 7.

Affidavit with interpleading Bill conclusive.

I have looked at this Record with great Care, and every Case I can find of Interpleader: and, though I doubt, whether there is perfect *bonâ fides* on the Part of the Plaintiff, I find it decided, that the Court is in the first Instance concluded by his Affidavit, that there is no Collusion; and will not admit an Affidavit to the contrary (1).

Upon the next Consideration, whether the Plaintiff has stated a Right to come here as to these Bills, for which it is said he would be answerable to his Principals, residing in *Scotland*, it is very difficult to maintain, that he would

(*a*) The Form of the Plaintiff's Affidavit is, "that "this Bill is not exhibited "by the Consent, Know- "ledge, or Combination, of "either of the Defendants "in the Bill mentioned, but "merely of his own free "Will, for Relief in this "honorable Court." *Harrison's* Pract. (Ed. by Mr. *Newland*), p. 402.

(1) 2 *Ves.* jun. 102.

not

not be answerable to them in an Action, if they revoked the Purpose, for which he was employed; but there is enough to make them Parties to a Bill of Interpleader. Next, if *Anderson* could maintain his Action of Trover for these Bills, and there is great Semblance that he might, that makes a double Claim; which according to some Authorities is sufficient (1). There is also an Attachment in *Scotland;* which from *Bell's* last Publication is a Circumstance raising considerable Doubt, whether Bills under such Circumstances are not attachable, notwithstanding what is said in *Erskine's* Institute: but, supposing, that attaching Creditor was not a Party, still there are divers Claims; as there are two other Parties. The Bill is therefore capable of being supported.

Whether Bills of Exchange may be attached in *Scotland*, under Circumstances, viz. in the Hands of an Agent or Factor, of the Debtor, though not against onerous Indorsees, *Quære.*

It was objected, that the *Goodalls* and the attaching Creditor are out of the Jurisdiction; and, as there is only one Creditor within the Jurisdiction, a Bill of Interpleader cannot be filed. Upon the Authorities that Proposition cannot be maintained; as a Person, out of the Jurisdiction, may threaten, and bring, an Action; and, though he should never come within the Jurisdiction, there is a familiar Mode of concluding him. The Plaintiff is bound to bring all Persons into the Field to contend together. That rests upon him. I have had Occasion to consider that with reference to Persons, not residing in *Scotland*, but Foreigners; and the Opinion I formed upon it, without any Difficulty, or the Aid of a Precedent, which I could not find, though there is Precedent enough of willing Defendants, is, that the Plaintiff in a Bill of Interpleader against Persons within and without the Jurisdiction is bound to bring them all within the Jurisdiction in a reasonable Time; if he does not, the Consequence is, that the only Person within the Jurisdiction

(1) 2 *Ves.* jun. 107. *Angell* v. *Hadden*, 15 *Ves.* 244.

must

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must have that, which is represented to be the Subject of Competition; and the Plaintiff must be indemnified against those, who are out of the Jurisdiction, when they think proper to come within it, and sue either at Law or in this Court. If the Plaintiff can shew, that he has used all due Diligence to bring Persons, out of the Jurisdiction, to contend with those, who are within it, and they will not come, the Court upon that Default, and their so abstaining from giving him the Opportunity of relieving himself, would, if they afterwards came here and brought an Action, order Service on their Attorney to be good Service, and injoin that Action for ever; not permitting those, who refused the Plaintiff that Justice, to commit that Injustice against him.

This Motion therefore must be granted; and the Demurrer over-ruled: but the Plaintiff must use prompt Diligence to get them within the Jurisdiction: if he does not, I shall dissolve the Injunction (1).

It

(1) Where the Plaintiff has parted with the Property, he cannot sustain an Interpleading Bill upon an Undertaking to pay over the Value to the Party entitled. *Burnett* v. *Anderson*, 1 *Meriv*. 405.

Coop. 245.
1815,
Jan. 25, 26.
1817,
Feb. 12.

MARTINIUS v. HELMUTH.

Bill of Interpleader by a Factor upon opposite Claims, as Principals, to the Benefit of a Policy of Insurance, retained by him, subject to his Expences.

Principle of Interpleader, that the Defendant, who improperly raises the double Claim, pays the Costs: but the Plaintiff, who is considered as undertaking to bring the Defendants before the Court, must use reasonable Diligence to get in the Answer of one, out of the Jurisdiction: if he will not come in, the other who appears, must have the Stake; and the Plaintiff will be protected: but whether he must not pay the Costs, *Quære*.

The Plaintiffs, Factors in *London*, in *August*, 1814, received from *Ludwig Arendt*, of *Wismar*, Notice of an intended Consignment to them for his Account of a Cargo

of

It was agreed, that the Money due upon the Bills should be received, and paid into Court by the Plaintiff.

of Wheat, 60 to 65 Lasts, from *Muller* and *Co.* of *Konigsberg*. In *September*, the Plaintiffs received a Letter from the Defendant *Helmuth*, at *Konigsberg*, announcing, that he was commissioned by *Arendt*, about compleating a Cargo of Wheat; requesting them to effect Insurance for said Friend; about 60 to 65 Lasts, Value about 1800*l.* A subsequent Letter from *Helmuth*, inclosed a Bill of Lading of 45 Lasts; stating, that the remaining Twenty would be shipped in the course of the Week; and that he had drawn upon them for 1000*l.* requesting them to protect the Bills for the Account of *Arendt*; otherwise to refer them to Messrs. *Bernoulli*, and then deliver them the Bill of Lading. The Plaintiffs effected the Insurance accordingly on Account of *Arendt*; giving Notice both to him and *Helmuth* that they had done so; and that they declined accepting the Bills, not having heard from *Arendt*. Afterwards by *Helmuth*'s Direction, in *October*, they delivered the Bill of Lading to *Bernoulli*, as having accepted the Bills; but retained the Policy. *Arendt* became insolvent: the Ship and Cargo were totally lost at Sea; and opposite Claims to the Policy being set up by *Helmuth* and by *Schmidt*, the Assignee of the Estate of *Arendt*, the Bill was filed, praying, that they may interplead; and an Injunction issue, restraining them from suing the Plaintiffs at Law, offering to deliver up the Policy to either of the Defendants, who is entitled thereto, on being repaid the 129*l.* advanced by them in effecting it. An Injunction having been obtained, the Defendant *Helmuth* moved to dissolve it: the other Defendant *Schmidt*, who was also resident abroad, not having appeared.

The Lord CHANCELLOR.

No Instance of a Bill of Interpleader brought to a Hearing.

I do not recollect a single Instance of a Bill of Interpleader brought to a Hearing. The Plaintiff in a Bill of Interpleader states, that Claims are made upon him by two or more Persons; and that Expression which has been referred to, (2 *Ves.* jun. 109, *Langston* v. *Boylston*,) that a Bill of Interpleader is in the

Nature

Analogy between Bills of Interpleader and to restrain Waste.

Nature of a Bill to restrain Waste, must have been used, perhaps not with strict Propriety, in this Sense; that if the Plaintiff was not permitted to bring into Court the Stake claimed from him by different Persons, one might recover against him at Law; and another might recover against him either at Law or in Equity; as I do not take it that the mere Circumstance that one may maintain an Action, and the other cannot, is an Objection to a Bill of Interpleader. I may illustrate this by supposing a Bond or Policy of Assurance assigned: if it had not got to the Hand of the Assignee, the Action would be in the Name of the Assignor: but if the Defendant had Notice, though that would not protect him at Law, it would in Equity require him not to pay the Person, who recovered against him at Law. He does not know the Nature of their different Claims; but knows only that they are good against him; requiring the Protection of a Court of Equity, as having no Interest in the Subject in his Possession, and being desirous of giving it to the Person entitled to it.

Equitable Claim against a legal Right of Action a Ground of Interpleader.

These Cases, where the Defendants, or any of them are abroad, are attended with great Inconvenience; the Plaintiff being bound to go on, to make the Parties appear, and bring them to a Hearing; if the Case cannot be brought forward upon Motion, so that the Court may see the Nature of it.

It is impossible to deny, that this Bill has been admitted in many Instances, where some of the Defendants were Foreigners, and residing abroad; that mere Circumstance cannot be alleged by one Defendant against the Plaintiff to the Extent, that he shall not maintain a Bill of Interpleader. That Defendant may insist on his using every possible Effort to bring the other Party to a Hearing. If those Efforts should prove unsuccessful, whenever that Case arises, the Court will give the Fund to that Party, who, the Plaintiff admits as against him, has the Right to it; and if the other Claimant, having had every Opportunity of coming in to assert his Right, afterwards thinks proper to sue, he would be restrained on the Ground

that

that he had not come in to litigate that Question, when he might; and I have before said that for that Reason I would grant an Injunction. In a very late Case (*Stevenson* v. *Anderson*) I required the Plaintiff to use every Endeavour to bring a Claimant, residing in *Scotland*, here; stating, that if, these Endeavours having been made, he would not come, I would grant an Injunction.

In this Case I am not willing to listen to the Objection, that a Demurrer might be put in, or an Answer; as the Course is, the Instant Explanation is obtained here to put the Cause in a Train for procuring a more speedy Determination than by bringing it to a Hearing. The mere Circumstance, that a Verdict might have been obtained, does not decide the Question of Interpleader; the Ground of Relief being, that the Plaintiff at Law may recover; and that there is another Person, who may recover, either at Law or in Equity, against the Plaintiff, seeking Relief here; desiring this Court, therefore, to bring the Claimants here to discuss their Rights; and then to direct some Proceeding, that may determine, to whom the Stake in his Possession belongs.

If you are not got to that Stage, that I can decide upon the absolute Right, I must take Care to have the Money, due upon this Policy of Insurance, brought into Court. This Defendant has a Right to have the Policy of Insurance put in safe Custody, or if he pleases, brought into Court; and farther, if the Plaintiffs will not sue upon the Policy of Insurance, to ask here for Liberty to use their Names, or by any other Means to get the Money into Court.

The Lord CHANCELLOR saying, he could not dissolve the Injunction, made an Order, directing the Policy to be brought into Court; and that the Defendant *Helmuth* should be at Liberty to bring an Action upon it in the Name of the Plaintiffs, indemnifying them; and bringing the Money into Court: the Plaintiffs to proceed with all reasonable Diligence to get in the Answer of *Schmidt*, with Jan. 26.

with Liberty to *Helmuth* to apply in case of any unreasonable Delay.

The Defendant *Helmuth* having under that Order brought an Action, and recovered, upon the Policy, the Plaintiffs moved, as of course upon an interpleading Bill, for their Costs.

The Lord CHANCELLOR.

1817. *Feb.* 12.

The Principle of Interpleader is, that the Defendant, who improperly raises the double Claim, must pay the Costs of it (*a*); and a Claim has frequently been made by one Person against another, out of the Jurisdiction; whose Answer it is therefore very difficult to procure; and in this Instance the Plaintiffs state a Claim upon them by two Persons, each living out of the Jurisdiction. This has occurred, particularly as to the Cases from *Scotland:* the Plaintiff says, a Person, who is ready to appear, claims; and also another, who is out of the Jurisdiction; and the Plaintiff claiming Protection against both, the Question is, what is to be done, if the Person, who is out of the Jurisdiction, will not make himself amenable. The Plaintiff must be put under Terms to get him here: otherwise, unless the Court lets the Money go out, binding him, who does not appear, by his Non-appearance, as if he had appeared, and failed to support his Claim, the Consequence would be, that the Plaintiff would suspend for ever the Right of the Individual, who is within the Jurisdiction, if he has a Right to the Money. The Plaintiff on an interpleading Bill is therefore always considered as undertaking to bring both Parties before the Court; and if he can shew, that he has used all reasonable Diligence for that Purpose, the Court will conclude him, who will not come. The Question then is, who in that Case is to pay the Costs: whether the Plaintiff, who has a double Claim made upon him by one Party coming in, and by another out of the Reach of Process, refusing to come in,

(*a*) *Dawson* v. *Hardcastle*, 2 *Cox*, 278. *Aldridge* v. *Mesner*, 6 *Ves.* 418. *Cowtan* v. *Williams*, 9 *Ves.* 107, and the References in the Note (*a*) 108.

and

and therefore to be considered as having made a wrongful Claim; as the other Defendant, who has made, as it must be taken, the right Claim; and therefore ought to pay no Costs.

That is not the Subject of a Motion of Course; but must be by a special Application on Affidavit, shewing what the Plaintiff has done to bring that Defendant before the Court, and certifying his Claim; stating precisely the Steps taken to get in his Answer, and the Nature of the Claim made by him upon the Plaintiff, who cannot throw the Costs upon the Defendant, who has answered, by merely waiving his Claim against him, who stands out. The Court is bound to take Care, that the Defendant, who is within the Jurisdiction, shall not be deprived of his Demand for ever by the Refusal of the other to come in; but must be satisfied, that the Plaintiff has taken all due Pains to bring him within the Jurisdiction; and here in Case the Plaintiffs did not proceed for that Purpose with reasonable Diligence, liberty was given to *Helmuth* to apply. Where the Bill is filed in consequence of an Action actually brought, not from the Fear only of a Demand, without any Attempt actually to enforce it by Suit, is it not of Necessity, that the Plaintiff, resorting here for his own Protection against a Defendant, who has been properly suing him at Law, must seek that Protection at his own Expense?

The Motion stood over upon a Proposal, by the Defendant, not to press for Costs, in Consideration of being permitted to retain the Money in his Hands, recovered upon the Policy.

1814,
LINCOLN'S INN HALL.
April 18.

SHARP *v.* ASHTON.

Order *nisi* to stay Proceedings at Law, obtained on Motion after the last Seal in the Vacation, the Brief not having been delivered to Counsel on the Seal Day, discharged with Costs, for Irregularity.

[413]

THE Plaintiff having obtained the usual Injunction to stay Proceedings at Law until Answer, on the 5th of *April* the Defendants filed their Answer; and on the same Day obtained an Order on Motion to dissolve the Injunction, unless Cause should be shewn on the 18th of *April*, the first Seal before *Easter* Term. The last Seal after *Hilary* Term was on the 23d of *March*. A Motion was made by the Plaintiff to discharge the Order of the 5th *April* for Irregularity, with Costs.

Sir *Samuel Romilly*, in support of the Motion, contended, that, the Defendants, not being in a Situation to move on the first Day of the last Seal, were not entitled to move until the Seal before the Term; and that if the Court allowed a Motion to dissolve an Injunction *Nisi*, which, not being a mere Motion of Course, can only be made in open Court, to be made at any Time, great Inconvenience would arise.

Mr. *Hart*, for the Defendants.

The Lord CHANCELLOR, observing, that strictly no Motion can be made at a Seal, the Brief for which was not put into the Counsel's Hands at least on the first Day of the Seal, said, he had endeavoured to correct the Practice in that Respect; and repeated the Necessity of adhering to the strict Rule.

The Order of the 5th of *April* was discharged, with 40*s.* Costs.

WATSON,

1814, *May* 3.

WATSON, *Ex parte.*

Proof in Bankruptcy in respect of Trust Property of Infants, coninued by the Administratrix in the Trade, in which the Testator was engaged, carried on by the Bankrupts, constituting a new Firm, of which the Administratrix was a Member.

THOMAS *Wright Watson*, engaged in Partnership with *Thomas* and *George Nelson*, in *April*, 1802, died intestate; leaving a Widow and nine infant Children. The Widow took out Administration from the Prerogative Court of *York*. In *October*, 1802, the Accounts of the late Partnership being stated, the Capital of *Watson*, due from the Partnership, appeared to be £25,155 : 3*s* . 9*d*. On the 8th of *October Elizabeth Watson*, the Widow, entered into Articles of Partnership with the *Nelsons*, and *George Cooke*, to carry on the said Business for a Term of Ten Years: *Elizabeth Watson*, who was to have a Moiety of the Profits, agreeing, that the Whole of her late Husband's Share and Property in the former Partnership should continue in the new one.

On the 12th of *January*, 1814, a joint Commission of Bankruptcy issued against the Firm. *Elizabeth Watson* as Administratrix offered to prove a Debt of £17,424:9*s*:8*d*. the Amount of Principal and Interest due from the Partnership to her Children in respect of five-ninth Parts by the Custom of *York*. The Proof being rejected, this Petition was presented, praying, that it may be received.

Mr. *Hart*, and Mr. *Shadwell*, in support of the Petition.

Sir *Samuel Romilly*, Mr. *Martin*, and Mr. *Cullen*, for the Assignees, contended, that the Widow, having as Administratrix embarked the whole Property in the Partner-

 ship

1814.

WATSON, *Ex parte.*

ship in which she was engaged, was answerable personally to the Children for their Proportion: but they had no Remedy against the joint Estate.

The Lord CHANCELLOR said, that the Administratrix committed a Breach of Trust by continuing this Money in the Trade; and the Partners, knowing, that a certain Proportion belonged to the Children, who, being Infants, could not contract, held this Money on the only Terms, on which they could hold it, as Debtors to the Children; as if it had been placed with them by Way of direct Loan. The clear Principle of Equity is, that, if a Trustee has made use of the Trust Property, the *Cestui que* Trust has an Option to have the Profit actually made, or Interest.

If it had been for the Benefit of these Children to prove against the separate Estate of their Mother, they might have done so, but it does not follow, that they may not prove under the joint Commission against the Partnership, having possessed the Property of these Infants under Circumstances, raising a clear Assumpsit.

The Order was made accordingly.

CURTIS

CURTIS *v.* RUSH.

ROLLS. 1814, *May* 3.

Specialty Security not waived by a Promisory Note, taken for the Balance of the Account of Interest.

AN Exception was taken to the Master's Report, disallowing the Defendant in his Accounts, as Executor, a Sum of £200, the Balance of £300 due for Interest on two Bonds: the Testator in *January*, 1795, having paid £100, and given his Promisory Note for the Remainder.

The Defendant insisted, that he took the Note merely as an Acknowledgment, without an Intention of changing his Security.

Sir *Samuel Romilly*, and Mr. *Wingfield*, in support of the Exception contended, that the Defendant by accepting the Note had not abandoned his specialty Security.

Mr. *Hart*, for the Plaintiff.

The MASTER *of the* ROLLS allowed the Exception.

ORDER OF COURT (1).

24th March, 1814.

WHEREAS by an Order of the Lord High Chancellor and Master of the Rolls, bearing Date the 28th Day of *November*, in the Year 1743, it was, amongst other Things, ordered, that for Copies of Draughts of Reports, Charges, Discharges, Bills of Costs, Accounts, Objections, Schedules of Writings, and other Matters brought before a Master, he should be paid by the Party requiring the same, Sixpence *per* Side (*a*); and whereas by virtue of such Order the said Sum *per* Side is payable for all Copies of Particulars for Sales to be made in the Offices of the Masters of the Court, who are intitled to settle such Particulars, and make out all Copies thereof; and whereas it has been found by long Experience, that it may be in many Cases beneficial to the Suitors of the Court, that the Masters should permit as many Particulars of Sale as should be thought desirable to be printed and dispersed upon a reasonable

(*a*) Lord *Hardwicke*'s Orders, p. 4. published by *Billingsley* in 1744 (2).

(1) Ord. Ch. (Ed. *Beam.*) 483.
(2) Ord. Ch. (Ed. *Beam.*) 373.

Payment being made in lieu of Sixpence *per* Side, to which they would be intitled upon written Copies, according to the above Order: It is therefore ordered, that the Solicitor for the Party prosecuting any Decree or Order of the Court for Sale shall be at Liberty, in Cases in which the Master shall think it fit, to print and disperse as many Particulars as shall be thought beneficial under the Direction of the Master in whose Office such Sale shall be, paying Sixpence *per* Side for so many printed Copies as there shall have been actual Bidders at the Sale, and no more, and that such Payment shall be allowed the Solicitor upon Taxation of his Costs.

ELDON, C.
W. GRANT, M. R.

We do direct, that this Order be entered with the Register; and that Copies thereof be set up in the Offices belonging to this Court.

ELDON, C.
W. GRANT, M. R.

ORDER OF COURT (1).

Tuesday, 13*th Dec*. 1814.

WHEREAS it is expedient, in order to expedite the Business of the Court, to order as follows: I do therefore hereby order, that every Notice of Motion intended to be made before his Honour the Vice-Chancellor upon any Matters, relative to which his Honour the Vice-Chancellor is authorized to make any Order or Orders (2), shall in future express, that the same is intended to be made before his Honour the Vice-Chancellor; and I do order, that such Motions, relative to such Matters as in the Notices thereof are mentioned to be intended to be made before his Honour the Vice-Chancellor, shall be accordingly made before his Honour the Vice-Chancellor: but this is to be without Prejudice to any Motion being made before his Honour the Vice-Chancellor, relative to any such Matters as aforesaid, the Notice of which shall not have expressed such Intention, if the Parties shall consent, that such Motion shall be so made; and in Cases, in which they shall so consent, I do further order, that such Motion shall also be made

(1) Ord. Ch. (Ed. *Beam.*) 484.
(2) See 53 *Geo.* 3. cap. 24.

before

before his Honour the Vice-Chancellor; and this is also to be without Prejudice to any Motions being made before his Honour the Vice-Chancellor, which the Lord Chancellor shall direct to be so made, and also to be without Prejudice to the Lord Chancellor's making any Orders upon Motions, which the Lord Chancellor may think fit to permit to be made before him, although the Notice of Motion shall have expressed, that it was intended to be made before his Honour the Vice-Chancellor; and I do further order, that this Order be entered with the Register, and Copies thereof set up in the several Offices of the Court.

ELDON, C.

Appointments after *Trinity* Term 1814:

Upon the Resignation of Sir *Archibald M'Donald* Sir *Vicary Gibbs*, one of the Judges of the Court of *Common Pleas*, was appointed Lord Chief Baron of the Court of *Exchequer*.

Sir *Robert Dallas*, Solicitor-General, was appointed to succeed Lord Chief Baron *Gibbs*, as one of the Judges of the Court of *Common Pleas*.

Serjeant *Shepherd*, His Majesty's Senior Serjeant, was appointed Solicitor-General.

ATTORNEY

ATTORNEY and SOLICITOR GENERAL's ORDER of PRECEDENCY.

In the Name and on the Behalf of His Majesty.

GEORGE P. R.

Order of Precedency of the Attorney and Solicitor General before the King's Serjeants.

WHEREAS our Attorney and Solicitor General now have Place and Audience in our Courts next after the two ancientest of our Serjeants at Law for the Time being, and before our other Serjeants at Law, We, considering the weighty and important Affairs, in which our Attorney and Solicitor-General are employed, and on which the Attorney and Solicitor-General of us, our Heirs and Successors, may hereafter be employed, Do hereby order and direct, that at all Times hereafter the Attorney and Solicitor-General of us, our Heirs and Successors, shall have Place and Audience as well before the said two ancientest of our Serjeants at Law, as also before every Person, who now is one of our Serjeants at Law, or hereafter shall be one of the Serjeants at Law of us, our Heirs or Successors; and we do hereby will and require you, not only to cause this our Direction to be observed in our Court of *Chancery*, but also to

to signify to the Judges of all our other Courts at *Westminster*, that it is our express Pleasure, that the same Course be observed in all our said Courts.

Given at our Court at Carlton House, this 14th Day of *December*, in the Fifty-fourth Year of His Majesty's Reign.

By Command of his Royal Highness the Prince Regent, in the Name and on the Behalf of his Majesty.

SIDMOUTH.

To the Right Honorable John Lord Eldon, our Chancellor of Great Britain.

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END OF THE SECOND VOLUME.

T. Davison, Lombard-street,
Whitefriars, London.